TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]. 1914

No. [redacted]. 381

J. D. LANKFORD, JOHN J. GERLACH, W. F. BARBER, AND A. D. KENNEDY, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA, APPELLANTS,

vs.

PLATTE IRON WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

FILED MARCH 5, 1914.

(24,080)

(24,080)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 929.

J. D. LANKFORD, JOHN J. GERLACH, W. F. BARBER, AND A. D. KENNEDY, COMPOSING THE STATE BANKING BOARD OF THE STATE OF OKLAHOMA, APPELLANTS,

vs.

PLATTE IRON WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 7, 1914.

1 In the District Court of the United States for the Western District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.
J. D. LANKFORD, JOHN J. GERLACH, A. D. KENNEDY, and W. F. BARBER, Defendants.

Citation.

UNITED STATES OF AMERICA:

To Platte Iron Works Company, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Western District of Oklahoma, wherein the Platte Iron Works Company is complainant, and J. D. Lankford, John J. Gerlach, W. F. Barber, and A. D. Kennedy composing the State Banking Board of the State of Oklahoma, are defendants, an appeal has been allowed the defendants therein to the Supreme Court of the United States. You are hereby cited and admonished to be and appear in said court at Washington thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed therefrom should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 27 day of January, A. D. 1914.

JOHN H. COTTERAL,
United States District Judge.

Jan. 27, 1914.

Service accepted.

CHAS. A. LOOMIS,
Sol. for Pl'ff.

2 [Endorsed:] No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, vs. J. D. Lankford et al., Defendants. Citation. Due and legal service of the within citation acknowledged this — day of ——, 1914. —— ——, Solicitor for Platte Iron Works Company, complainant. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

3 In the District Court of the United States in and for the Western District of the State of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,

vs.

J. D. LANKFORD, LEE CRUCE, J. C. MCCLELLAND, F. G. DENNIS, John J. Gerlach, A. D. Kennedy, and W. F. Barber, Defendants.

Second Amended and Supplemental Bill of Complaint.

First Count.

The plaintiff in this its second amended and supplemental bill of complaint herein, for its cause of action alleges:

That the Platte Iron Works Company, is a corporation organized and incorporated under the laws of the State of Maine, and is a citizen of the State of Maine.

That the defendant, J. D. Lankford, was at the times herein mentioned and is the duly qualified and acting bank commissioner of the State of Oklahoma; and that the defendants Lee Cruce, J. C. McClelland and F. G. Dennis, were at the times herein mentioned, and at the time of the commencement of this suit up to and until the change of the law, and the appointment of a new banking board as hereinafter alleged, the duly qualified and acting members of the State Banking Board of Oklahoma.

That since the beginning of this suit, and at the last session of the Legislature of the state of Oklahoma, by Senate Bill No. 231 which was duly enacted and became a law, the law governing
4 the depositors' guaranty fund, was amended creating a new banking board and prescribing their duties, and that under and pursuant to said law, the defendants John J. Gerlach, A. D. Kennedy, and W. F. Barber were duly and legally appointed members of the State Banking Board, succeeding the defendants Lee Cruce, J. C. McClelland and F. G. Dennis; and the said defendants, John J. Gerlach, A. D. Kennedy and W. F. Barber are now the duly qualified and acting members of the State Banking Board of the State of Oklahoma.

That the Farmers & Merchants Bank, was and is a corporation duly and legally incorporated as a banking institution under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business in Sapulpa, Creek County, Oklahoma, at which place it conducted a state bank, under and pursuant to the laws of Oklahoma, governing State Banks, until said bank was closed and taken possession of by the defendant, J. D. Lankford, the State Bank Commissioner, on or about the 10th day of September, 1912, as hereinafter alleged.

That heretofore towit, on the 8th day of June, 1912, E. J. Merkle

& Company, of Kansas City, Missouri, deposited in said Farmers & Merchants Bank, the sum of $3,900.00 and said Farmers & Merchants Bank, at said time issued and delivered to said E. J. Merkle & Company a certificate of deposit, evidencing said deposit, which said certificate of deposit is as follows:

"SAPULPA, OKLA., *June* 8, 1912. No. 1012.

This is to certify that E. J. Merkle & Company has deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, $3,900.00 Thirty-nine hundred Dollars. Payable 60 days *months* after date on the return of this Certificate properly endorsed, with interest at the rate of 3 per cent per annum, if left 3 mo. and 4% per annum if left 6 mo.

(Not over Four Thousand $4,000.)

B. B. BURNETT, *Cashier.*

Certificate of Deposit.
Not subject to check."

That said sum of $3,900.00 evidenced by said certificate of deposit, continued in and remained on deposit in said bank from said date until the failure of said bank, and until the same was taken possession of by said J. D. Lankford, State Bank Commissioner, of the State of Oklahoma as herein alleged.

Thereafter and before the maturity said deposit and said certificate of deposit was sold, assigned and transferred, by E. J. Merkle & Company, for value to the Trustees, The Platte Iron Works Company, Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by said Trustees, the Platte Iron Works Company, Dayton, Ohio, for value to the City National Bank, of Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned, transferred by the City National Bank, Dayton, Ohio, for value to the Trustees, The Platte Iron Works Company, by endorsement on said certificate; that thereafter said deposit and said certificate of deposit was sold, assigned and transferred by the Trustees, the Platte Iron Works Company for value to the Platte Iron Works Company, Dayton, Ohio, plaintiff herein, by endorsement on said certificate of deposit, who is now the legal owner and holder thereof. That a copy of said certificate and the endorsements thereon is herewith filed, marked "Exhibit A" and made a part hereof.

6 Plaintiff further alleges that on or about the 10th day of September, 1912, the defendant J. D. Lankford, as Bank Commissioner of the State of Oklahoma, took possession of the Farmers & Merchants Bank of Sapulpa, and all of its assets, and property, and proceeded to wind up its affairs, under and in accordance with the laws of the state of Oklahoma, and from said date hitherto, has been and still is in full possession and control of the same.

That said deposit and said certificate of deposit have not been

paid, and the same is still due and unpaid; that the defendants Lee Cruce, J. C. McClelland and F. G. Dennis, who constituted the State Banking Board of the State of Oklahoma, until the change in said banking board as herein alleged, were at all of said times up until said change in said board in full possession, management and control of the depositors' guaranty fund of the state of Oklahoma, and that the defendants John J. Gerlach, A. D. Kennedy, W. F. Barber, have been since said change hitherto, and are now the legally qualified and acting members of the State Banking Board of the State of Oklahoma, and ever since their appointment and qualification, have been and are in full possession, management and control of the depositors' guaranty fund of the State of Oklahoma; that it became, was and is the duty of said State Banking Board to pay the depositors of the Farmers & Merchants Bank aforesaid, including this plaintiff, out of the depositors' guaranty fund, in accordance with the laws of the State of Oklahoma; and if at any time the depositors' guaranty fund on hand shall be insufficient to pay the depositors, and other indebtedness properly chargeable against the same, it became and was and is the duty of the said State Banking Board, to issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate the deposits and other
7 indebtedness properly chargeable against the Depositors' Guaranty Fund.

Plaintiff further alleges that said deposit and said certificate of deposit is an indebtedness properly chargeable against the depositors' guaranty fund of the State of Oklahoma.

Plaintiff further alleges that prior to the beginning of this suit demand was made of the State Banking Board, to pay said deposit and said certificate of deposit out of the depositors' guaranty fund, and if said fund was not sufficient to pay same, that said state *state* banking board issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma," for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that since the amendment of the law as herein alleged governing the State Banking Board, and the Depositors' Guaranty Fund, and since the appointment, qualification and organization of the present State Banking Board, composed of the said defendants John J. Gerlach, A. D. Kennedy, and W. F. Barber, demand was duly made of the said State Banking Board to pay said deposit and said certificate of deposit out of the Depositors' Guaranty Fund, and if said fund was not sufficient to pay same, that the said State Banking Board issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma" for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that said deposit and said certinficate of deposit is still due and owing to plaintiff and there is now due and owing the plaintiff therefor, the sum of $3,900.00 together with four per cent

interest from June 8th, 1912, and that plaintiff is entitled to payment thereof, out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma.

8 That the defendants J. D. Lankford, Lee Cruce, J. C. McClelland, F. G. Dennis, John J. Gerlach, A. D. Kennedy and W. F. Barber, are residents and citizens of the State of Oklahoma, and of the Western District in said State; that the official office and place of business of said J. D. Lankford, State Bank Commissioner, and the said State Banking Board, is in the city of Oklahoma, State of Oklahoma, and in the Western District of said State; that the matters and amount in dispute exceed, exclusive of interest and costs, the sum and value of $3,000.00.

In consideration whereof, for as much as the plaintiff is remediless in the premises, and is by the strict rules of common law, only relievable in a court of equity, where matters of this nature are cognizable, the plaintiff prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit and certificate of deposit, and interest thereon, and is entitled to have the same paid of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board, of the State of Oklahoma, composed of John J. Gerlach, A. D. Kennedy, and W. F. Barber, defendants herein; and in case the Depositors' Guaranty Fund on hand is insufficient to pay the same, that plaintiff be and is entitled to have issued to plaintiff, certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate said deposit and said certificate of deposit; and that said John J. Gerlach, A. D. Kennedy, and W. F. Barber, composing said State Banking Board of the State of

9 Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon, out of the Depositors' Guaranty Fund; and if there are not sufficient funds in said Depositors' Guaranty Fund, available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificate of deposit, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," bearing six per cent interest, as provided by section 3, of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board, be ordered, commanded and required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpose of increasing such Depositors' Guaranty Fund, and paying said deposit, and said certificates of indebtedness, known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma, and for such other and further relief as shall seem meet and agreeable in equity and good conscience.

Second Count.

The plaintiff for its second cause of action herein alleges:

That the Platte Iron Works Company, is a corporation organized and incorporated under the laws of the State of Maine, and is a citizen of the State of Maine.

That the defendant J. D. Lankford, was at the times herein mentioned, and is the duly qualified and acting bank commissioner of the State of Oklahoma; and that the defendants Lee Cruce,
10 J. C. McClelland and F. G. Dennis, were at the times herein mentioned, and at the times of the commencement of this suit up to and until the change of the law, and the appointment of a new banking board as hereinafter alleged, the duly qualified and acting members of the State Banking Board of Oklahoma. That since the beginning of this suit, and at the last session of the Legislature of the State of Oklahoma, by Senate Bill No. 231, which was duly enacted and became a law, the law governing the Depositors' Guaranty Fund, was amended creating a new banking board and prescribing their duties, and that under and pursuant to said law, the defendants John J. Gerlach, A. D. Kennedy and W. F. Barber were duly and legally appointed members of the State Banking Board, succeeding the defendants Lee Cruce, J. C. McClelland and F. G. Dennis; and the said defendants John J. Gerlach, A. D. Kennedy and W. F. Barber are now the duly qualified and acting members of the State Banking Board of the State of Oklahoma.

That the Farmers & Merchants Bank, was and is a corporation duly and legally incorporated as a Banking institution, under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business in Sapulpa, Creek County, Oklahoma, at which place it conducted a state bank, under and pursuant to the laws of Oklahoma, governing State Banks until said bank was closed and taken possession of by the defendant, J. D. Lankford, the State Bank Commissioner, on or about the 10th day of September, 1912, as hereinafter alleged.

That heretofore, towit, on the 8th day of June, 1912, E. J. Merkle & Company, of Kansas City, Missouri, deposited in said Farmers & Merchants Bank, the sum of $3,900.00 and said Farmers & Merchants Bank, at said time issued and delivered to said E. J.
11 Merkle & Company a certificate of deposit, evidencing said deposit, which said certificate of deposit is as follows:

"SAPULA, OKLA., *June* 8, 1912. No. 1013.

This is to certify that E. J. Merkle & Company Has deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, $3,900.00 Thirty-nine Hundred dollars, payable 3 months after date on the return of this certificate properly endorsed, with interest at the rate of 3 per cent per annum, if left 3 mo. or 4% per annum if left 6 mo.

(Not over Four Thousand $4,000$.)

B. B. BURNETT, *Cashier.*

Certificate of Deposit.
Not subject to check."

That said sum of $3,900.00 evidenced by said certificate of deposit, continued in and remained on deposit in said bank from said date until the failure of said bank, and until the same was taken possession of by said J. D. Lankford, State Bank Commissioner, of the State of Oklahoma, as herein alleged.

Thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by E. J. Merkle & Company, for value to the Trustees, The Platte Iron Works Company, Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by said Trustees, The Platte Iron Works Company, Dayton, Ohio, for value to the City National Bank, Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by the City National Bank, Dayton, Ohio, for value to the Trustees, The Platte
12 Iron Works Company, by endorsement on said certificate; that thereafter said deposit and said certificate of deposit was sold, assigned and transferred by the Trustees, The Platte Iron Works Company, for value to The Platte Iron Works Company, Dayton, Ohio, plaintiff herein, by endorsement on said certificate of deposit, who is now the legal owner and holder thereof. That a copy of said certificate and the endorsements thereon is herewith filed marked "Exhibit B" and made a part hereof.

Plaintiff further alleges that on or about the 10th day of September, 1912, the defendant, J. D. Lankford, as Bank Commissioner of the State of Oklahoma, took possession of the Farmers & Merchants Bank of Sapulpa, and all of its assets, and property, and proceeded to wind up its affairs, under and in accordance with the laws of the State of Oklahoma, and from said date hitherto, has been and still is in full possession and control of the same.

That said deposit and said certificate of deposit have not been paid, and the same is still due and unpaid; that the defendants Lee Cruce, J. C. McClelland and F. G. Dennis, who constituted the State Banking Board of the State of Oklahoma, until the change in said Banking board as herein alleged, were at all of said times up until said change in said board in full possession, management and control of the Depositors' Guaranty Fund of the State of Oklahoma, and that the defendants John J. Gerlach, A. D. Kennedy and W. F. Barber, have been since said change, hitherto, and are now the legally qualified and acting members of the State Banking Board of the State of Oklahoma, and ever since their appointment and qualification, have been and are in full possession, management, and control of the Depositors' Guaranty Fund of the State of Oklahoma; that it be-
13 came, was, and is the duty of the State Banking Board to pay the depositors of the Farmers & Merchants Bank aforesaid, including this plaintiff, out of the Depositors' Guaranty Fund, in accordance with the laws of the State of Oklahoma; and if at any time the Depositors' Guaranty Fund on hand shall be insufficient to pay the depositors, and other indebtedness properly chargeable against the same, it became and was and is the duty of the said State Bank-

ing Board, to issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate the deposits and other indebtedness properly chargeable against the Depositors' Guaranty Fund.

Plaintiff further alleges that said deposit and said certificate of deposit is an indebtedness properly chargeable against the Depositors' Guaranty Fund of the State of Oklahoma.

Plaintiff further alleges that prior to the beginning of this suit demand was made of the State Banking Board, to pay said deposit and said certificate of deposit out of the Depositors' Guaranty Fund, and if said fund was not sufficient to pay same, that said State Banking Board issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that since the amendment of the law as herein alleged governing the State Banking Board, and the Depositors' Guaranty Fund, and since the appointment, qualification and organization of the present State Banking Board, composed of the said defendants John J. Gerlach, A. D. Kennedy, and W. F. Barber, demand was duly made of the said State Banking Board to pay said deposit and said certificate of deposit out of the De-
14 positors' Guaranty Fund, and if said fund was not sufficient to pay same, that the said State Banking Board issue certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma" for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that said deposit and said certificate of deposit is still due and owing to plaintiff and there is now due and owing the plaintiff therefor, the sum of $3,900.00 together with four per cent interest from June 8th 1912, and that plaintiff is entitled to payment thereof, out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma.

That the defendants J. D. Lankford, Lee Cruce, J. C. McClelland, F. G. Dennis, John J. Gerlach, A. D. Kennedy, and W. F. Barber, are residents and citizens of the State of Oklahoma, and of the Western District in said State; that the official office and place of business of said J. D. Lankford, State Bank Commissioner, and the said State Banking Board, is in the City of Oklahoma, State of Oklahoma, and in the Western District of said State; that the matters and amount in dispute exceed, exclusive of interest and costs, the sum and value of $3,000.00.

In consideration whereof, for as much as the plaintiff is remedyless in the premises, and is by the strict rules of common law, only relievable in a court of equity, where matters of this nature are cognizable, the plaintiff prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit and cer-

tificate of deposit, and interest thereon, and is entitled to have
15 the same paid out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board, of the State of Oklahoma, composed of John J. Gerlach, A. D. Kennedy, and W. F. Barber, defendants herein; and in case the Depositors' Guaranty Fund on hand is insufficient to pay the depositors of said bank, and other indebtedness, chargeable against same, that plaintiff be and is entitled to have issued to plaintiff, certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate said deposit, and said certificate of deposit; and that said John J. Gerlach, A. D. Kennedy, and W. F. Barber, composing said State Banking Board, of the State of Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon, out of the Depositors' Guaranty Fund; and if there are not sufficient funds in said Depositors' Guaranty Fund, available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificate of deposit, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," bearing six per cent interest, as provided by section 3, of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board, be ordered, commanded, and required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws
of the State of Oklahoma, for the purpose of increasing such
16 Depositors' Guaranty Fund, and paying said deposit, and said certificates of indebtedness, known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma, and for such other and further relief as shall seem meet and agreeable in equity and good conscience.

CHAS. A. LOOMIS,
Att'y for Plaintiff.

17 "EXHIBIT A."

Copy.

SAPULPA, OKLA., *June* 8, 1912. No. 1012.

This is to certify that E. J. Merkle & Company, has deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, $3,900.00 Thirty-nine Hundred Dollars payable 60 days *months* after date on the return of this certificate properly endorsed, with interest at the rate of 3 per cent per annum if left 3 mo. and 4% per annum if left 6 mo.

(Not over Four Thousand $4,000$.)

B. B. BURNETT, *Cashier.*

Certificate of deposit.
Not subject to check.

2—929

(Endorsed on the back as follows:)

Pay to the order of Trustees The Platte Iron Works Co., Dayton, Ohio.

E. J. MERKLE & CO.,
By E. J. MERKLE.

Pay to the order of The City Nat'l Bank, Dayton, Ohio.
TRUSTEES THE PLATTE IRON WORKS Co.
J. F. HARTLIEB, *Chairman.*

Pay Trustees Platte Iron Works Co., or order, without recourse on us.

CITY NAT'L BANK, DAYTON, OHIO.
CLARENCE KEIFER, *Cashier.*

Pay to the order of the Platte Iron Works Co.
TRUSTEES OF THE PLATTE IRON WORKS CO.,
By E. F. PLATTE, *Treas.*

18 "EXHIBIT B."

Copy.

SAPULPA, OKLA., *June* 8, 1912. No. 1013.

This is to certify that E. J. Merkle & Company Has Deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, $3,900.00, Thirty — Hundred Dollars, payable 3 months after date on the return of this certificate properly endorsed, with interest at the rate of 3 per cent per annum, if left 3 mo. or 4% per annum if left 6 mo.

(Not over four thousand $4,000$.)

B. B. BURNETT, *Cashier.*

Certificate of Deposit.
Not subject to check.

(Endorsed on the back as follows:)

Pay to the order of Trustees The Platte Iron Works Co., Dayton, Ohio.

By E. J. MERKLE & CO.;
By E. J. MERKLE.

Pay to the order of City Nat'l Bank, Dayton, Ohio.
TRUSTEES THE PLATTE IRON WORKS CO.
J. F. HARTLIEB, *Chairman.*

Pay Trustees Platte Iron Works Co., or order, without recourse on us.

CITY NATIONAL BANK, DAYTON, OHIO.

Pay to the order of the Platte Iron Works Co.
TRUSTEES OF THE PLATTE IRON WORKS CO.,
By E. F. PLATTE, *Treas.*

19 Endorsed: No. 1. Platte Iron Works Company, Plaintiff, vs. J. D. Lankford, et al., Defendants. Second Amended and Supplemental Bill of Complaint. Filed April 4, 1913. Arnold C. Dolde, Clerk. Chas. A. Loomis, Attorney for plaintiff.

20 In the District Court of the United States for the Western District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.
J. D. LANKFORD, LEE CRUCE, J. C. MCCLELLAND, F. G. DENNIS, John J. Gerlach, A. D. Kennedy, and W. F. Barber, Defendants.

Motion to Dismiss Second Amended Bill of Complaint.

And now come the defendants, J. D. Lankford, Lee Cruce, J. C. McClelland, F. G. Dennis, John J. Gerlach, A. D. Kennedy and W. F. Barber, by Chas. West, Attorney General of the State of Oklahoma, and move the Court to dismiss plaintiff's second amended bill of complaint for the following reason:

That the Court has no jurisdiction of the subject of the action or the persons of the defendants, said suit being one against the State of Oklahoma without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.

Wherefore, defendants pray judgment whether they shall further answer, and that they may be dismissed with their costs.

CHAS. WEST,
Attorney General of the State of Oklahoma.

Endorsed: No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, Plaintiff, vs. J. D. Lankford, et al. Defendants. Filed April 24, 1913. Arnold C. Dolde, Clerk By Frank T. McCoy, Deputy. Chas. West, Attorney General.

21 In the District Court of the United States for the Western District of Oklahoma.

In Equity. Number 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

Order.

On this fifteenth day of July, 1913, the motion of the defendants to dismiss the plaintiff's second amended bill of complaint herein comes on for determination, and the court, being duly advised in the premises, orders that the said motion be and it is hereby overruled; and it is further ordered that the defendants plead to the said bill in thirty days from this date. To the foregoing orders and each of them the defendants except.

JOHN H. COTTERAL,
District Judge.

Endorsed: No. 1. Platte Iron Works Co. vs. J. D. Lankford, et al. Order overruling motion to dismiss bill. Filed July 15, 1913. Arnold C. Dolde, Clerk.

22 In the District Court of the United States in and for the Western District of the State of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,
vs.
J. D. LANKFORD, LEE CRUCE, J. C. MCCLELLAND, F. G. DENNIS, John J. Gerlach, A. D. Kennedy, and W. F. Barber, Defendants.

Now on this 7th day of January, 1914, this cause coming on to be heard upon the second amended bill of complaint of the plaintiff, and the answer of the defendants; the parties appearing in person and by their attorneys, and all and singular the matters in issue were submitted to the court and the court having heard the evidence, and being fully advised in the premises:

It *was* ordered, adjudged and decreed by the court that on June 8th, 1912, E. J. Merkle & Company, deposited in the Farmers & Merchants Bank of Sapulpa, Oklahoma Seventy-eight Hundred Dollars ($7,800.00) and accepted and received from said Bank, as evidence of said deposit the two certificates of deposit, described in the first and second counts of plaintiff's second amended bill of complaint; and that thereafter, and before the maturity of said Certificates of Deposit, the plaintiff acquired said deposits and said certificates of deposit from said E. J. Merkle & Company, by purchase, for value, and is now the owner and holder of said deposits and said certificates of deposit.

The court further finds, adjudges and decrees that plaintiff as the holder and owner of said deposits and said certificates of deposit, be and is entitled to have said deposits and said certificates of
23 deposit allowed by the state banking board of the state of Oklahoma, as a valid claim against the depositors' guaranty fund of the state of Oklahoma, and is entitled to have said deposits paid out of the depositors' guaranty fund of the state of Oklahoma, on an equal basis with all depositors of failed banks in said state, and if at any time the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against the same, that plaintiff be and is entitled to have the state banking board of Oklahoma issue to plaintiff certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," and that plaintiff is entitled to interest on said certificates of deposit, at three per cent per annum until September 10, 1912, and six per cent per annum thereafter to this date.

It is further ordered, adjudged and decreed by the court that plaintiff have and recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber as members of the State Banking board of the state of Oklahoma the sum of $4,241.25 on the first count in plaintiff's second amended bill of complaint, and that the same be paid out of and from the depositors' guaranty fund *fund* of the state of Oklahoma. And if the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed by the court that plaintiff have and recover of and from the defendant-, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber, as members of the State Banking Board of the State of Oklahoma,
24 the sum of $4,241.25 on the second count of plaintiff's second amended bill of complaint, and that the same be paid out of the depositors' guaranty fund of the state of Oklahoma. And if the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma" sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed that the plaintiff recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber, as members of the state banking board, its costs in this action.

JOHN H. COTTERAL, *Judge.*

Approved as to form.
JOS. L. HULL,
Ass't Att'y Gen.

Endorsed: No. 1. In Equity. Platte Iron Works Co. Plaintiff, vs. J. D. Lankford, et al. Defendants. Decree. Filed Jan. 7, 1914. Arnold C. Dolde, Clerk.

25 Thereafter, on January 23rd, 1914, the following proceedings were had in said case by said court, to-wit:

No. 1.

PLATTE IRON WORKS COMPANY, Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

Now on this 23rd day of January, 1914, it is ordered that the hearing upon the matter of settling the appeal by defendants herein, be and the same is hereby assigned for January 29th, 1914, at 10 o'clock a. m.

26 Thereafter, on January 26th, 1914, the following proceedings were had in said case by said court, to-wit:

No. 1.

PLATTE IRON WORKS COMPANY, Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

On this 26th day of January, 1914, it is ordered that the matter of the settling of the appeal herein, be re-assigned for hearing at Oklahoma City, in said District, on Friday, January 30th, 1914, at 10 o'clock a. m.

27 In the District Court of the United States for the Western District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.
J. D. LANKFORD, JOHN G. GERLACH, A. D. KENNEDY, and W. F. BARBER, Defendants.

Petition for Appeal.

The above named defendants, to-wit, J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, conceiving themselves aggrieved by the final judgment and decree made and entered by the above court in said cause on the 7th of January, 1914, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed

herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

Petitioners show that there is no cash available in the Depositors' Guaranty Fund for the purpose of paying the judgment rendered in this cause; that petitioners' terms of office expire on the first of January, 1915, and since the decree of this case is rendered against them, in their official capacity, they should not be required to give a bond to pay out of the Depositors' Guaranty Fund or to issue Depositors' Guaranty Fund Warrants upon the final determination of this case on appeal, for the amount stated in said decree, for the
28 reason that unless the appeal is finally determined prior to the first of January 1915 petitioners would be without power to comply with said decree.

Wherefore, Petitioners pray that this court make an order superseding the said decree without requiring of these defendants a supersedeas bond, but upon their issuing the Depositors' Guaranty Fund warrants in accordance with the decree in this cause, and depositing them with the Clerk of this Court, to be held by him, pending the final determination of the appeal, to be then delivered either to the complainants, or returned to defendants, or their successors in office, to be cancelled in accordance with such final judgment on appeal.

CHAS. WEST,
Attorney General;
JOS. L. HULL,
Assistant Attorney General;
Solicitors for Defendants.

29 *Affidavit.*

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Personally appeared before me, the undersigned, an officer of the law authorized to administer oaths, J. D. Lankford, who being sworn upon oath says:

That he is Bank Commissioner of the State of Oklahoma, and as such the Chairman of the State Banking Board; that he has read the foregoing petition for appeal and that there is no cash available now for the purpose of paying the final decree in this cause, for the reason that the Depositors' Guaranty Fund Warrants heretofore issued, which under the law must be paid serially in the order of their issuance are greatly in excess of the cash on hand in the Depositors' Guaranty Fund.

J. D. LANKFORD.

Subscribed and sworn to before me this 22nd day of January, 1914.

[SEAL.]

E. F. SMITH,
Notary Public.

My commission expires Dec. 19, 1917.

30 Ordered that the appeal prayed for in the foregoing petition be and hereby is, allowed upon the approval of a bond on appeal *as* conditioned as required by law in the sum of Five Hundred (500) Dollars; the motion for supersedeas as prayed is denied; but said appeal shall operate as a supersedeas upon the defendants' giving a supersedeas bond conditioned as required by law in the sum of Eleven Thousand Dollars, and upon the same being approved.

JOHN H. COTTERAL,
Judge U. S. District Court.

Endorsed: No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, Plaintiff, vs. J. D. Lankford, et al., Defendants. Petition for Appeal, etc. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

31 In the District Court of the United States for the Western District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.
J. D. LANKFORD, JOHN J. GERLACH, A. D. KENNEDY, and W. F. BARBER, Defendants.

Assignments of Error.

And now on this 23rd day of January, A. D. 1914, come the defendants by their solicitor, Chas. West, Attorney General, and say that the decree entered in the above cause on the 7th day of January, A. D. 1914, is erroneous and unjust to defendants.

First, because the court erred in overruling defendants' motion to dismiss the second amended bill of complaint for the following reasons, to-wit:

1. That said suit was an original action in mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained.

2. Because said suit was in fact against the State of Oklahoma to which it had not given its consent and as such it was prohibited by the eleventh amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said state, all of which appeared on the face of the bill of complaint.

Second. Because the court erred in rendering final judgment in said action for the following reasons:

1. That said suit was an original action in mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained.

32 2. Because said suit was in fact against the state of Oklahoma, to which it had not given its consent, and as such it

was prohibited by the Eleventh Amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said state, all of which appeared on the face of the bill of complaint.

3. Because the second amended bill upon its face stated no cause of action for the relief sought, or for any relief.

Wherefore, The defendants pray that the said decree be reversed and the district court directed to dismiss the bill at complainant's cost.

CHAS. WEST,
Attorney General;
JOS. L. HULL,
Assistant Attorney General;
Solicitors for Defendants.

Endorsed: No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, vs. J. D. Lankford, et al. defendants. Assignment- of error. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

33 In the United States District Court for the Western District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,
vs.
J. D. LANKFORD et al., Defendants.

Præcipe for Transcript of Record.

The Clerk of said Court will prepare a transcript of record in this case on appeal from this court to the Supreme Court of the United States and will include therein:

The second amended bill of complaint:

The motion to dismiss the second amended bill of complaint:

The order overruling the motion to dismiss; the final decree; and such other pleadings, orders, process, bonds etc. as may be filed in said cause after the 7th day of January, A. D., 1914.

CHAS. WEST, *Att'y Gen'l,*
Solicitor for Defendants,
By JOS. L. HULL,
Assistant Att'y Gen.

Service of copy of above præcipe upon me is acknowledged this 21st day of January, 1914.

CHAS. A. LOOMIS,
Solicitor for Complainant.

Endorsed: No. 1. In the U. S. District Court for the Western District of Oklahoma. Platte Iron Works Company, vs. J. D. Lankford, et al. Præcipe for transcript of record. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

34 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,
vs.
J. D. LANKFORD et al., Defendants.

Motion.

Comes now the complainants and appellee and represents to the court that it will be impossible for him to prepare and file his præcipe and additional portions of the record he desires incorporated therein within the time prescribed by rule 75, and he therefore prays additional time to file his præcipe herein and present therewith such additional portions of the record as he may desire incorporated therein.

CHAS. A. LOOMIS,
Solicitor for Complainant.

This January 27, 1914.

Order.

The above motion coming on for hearing, it is ordered by the court that the complainant be given until February 2nd, 1914 to file his præcipe herein, accompanying therewith such additional portions of the record as he shall desire incorporated therein, and that the entire record be completed within two days thereafter.

JOHN H. COTTERAL, *Judge.*

This January 27, 1914.

Endorsed: #1. Platte Iron Wks. vs. J. D. Lankford, et al. Motion and order. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

35 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,
vs.
J. D. LANKFORD et al., Defendants.

Præcipe of Complainant for Additional Portions of Record.

The clerk of this court will include in the transcript of the record in this cause on appeal from this court to the Supreme Court of the United States, in addition to the portions of the record designated in præcipe filed by defendants the following:

All of the testimony introduced upon the trial of the cause, a copy of which has been filed herein, approved by the judge of this court.

CHAS. A. LOOMIS,
Solicitor for Complainant.

Service of copy of the above præcipe upon me is acknowledged this 27th day of January, 1914.

JOS. L. HULL, *Ass't Att'y Gen.,*
Solicitor for Defendants.

Endorsed: #1. Platte Iron Wks. vs. J. D. Lankford. Præ- for additional record. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

36 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,
vs.
J. D. LANKFORD et al., Defendants.

Statement of Facts.

The following testimony was introduced upon the trial of the cause before the court:

Plaintiff offers and reads in evidence a written stipulation between plaintiff and defendant showing a transfer of the certificates of deposit and deposits sued on from E. J. Merkle & Company to plaintiff for value; and showing that the original defendants, Lee Cruce, J. C. McClelland, F. G. Dennis, have been superseded since the commencement of the suit by the present members of the State Banking Board, to-wit, John J. Gerlach, A. D. Kennedy and W. F. Barber, their successors in office; and that the Farmers and Merchants Bank, at Sapulpa, Oklahoma, was duly and legally incorporated as a state bank, with its principal office at Sapulpa, Oklahoma; and the same was taken charge of on September 10th, 1912, by J. D. Lankford, State Bank Commissioner, together with all its assets, who proceeded to wind up its affairs in accordance with the state banking laws of the State of Oklahoma, and has hitherto and to this date continued and remained in full possession and control of the same; and that the plaintiff is a corporation, organized and incorporated under the laws of the State of Maine, and is a citizen of the State of Maine; and that J. D. Lankford, one of the defendants, was at all times herein mentioned, and is the duly qualified and acting Bank Commissioner of the State of Oklahoma.

37 The witnesses C. F. WURTZBERGER, being called by the plaintiff and duly sworn, testified as follows:

That on and prior to September 12, 1912, and at the present time

he was City Treasurer of the City of Sapulpa, Oklahoma, and the Commissioner of Finance, being the legal custodian of the funds of said city. That at that time the funds of the said City were deposited in the Farmers and Merchants Bank and other banks in Sapulpa. That he was City Treasurer at the time of the settlement made between the City of Sapulpa and the Southwestern Engineering Company, who had a contract with said city for the construction of a water-works system. Witness had with him and presented city warrants issued by him as said treasurer to E. J. Merkle & Co. for work done on that job, and also check issued by him as City Treasurer in payment for said warrant. Said warrant was in the usual form, and issued to E. J. Merkle & Co. for $10,429.16, drawn on the treasurer, with proper endorsements, and a check was issued by him as treasurer of said city payable to the order of E. J. Merkle & Co. for $10,429.16, drawn on the Farmers and Merchants Bank of Sapulpa, Oklahoma, delivered to L. J. Roach, attorney for E. J. Merkle & Company in payment of said warrant. That the check after having been paid by the bank was returned to him properly endorsed, charged to his account in his bank as treasurer of said city. That this warrant and check were drawn against the water works fund. The witness exhibited a bank book showing deposits and checks as city treasurer, and stated that was his regular bank book, kept in the usual course of business with said bank, showing his deposits and checks therein as city treasurer, which bank book was offered in evidence, and showed on the date of the issuance of the check above mentioned that as city treasurer of said city he then had on deposit in said bank $28,053.44, and said bank book further showed that the check in question was charged against said Wurtzberger as a
38 debit in said bank book; that said check was paid by the bank and charged to his account and returned to him as a paid check by the bank in the usual course of business; that the bank book showed credits and debits made in the usual course of business in the handwriting of the bank officials. That at the time the bank closed September 10th, 1912, wit*h*ess had on deposit in said bank $36,455.00 and some cents. That subsequent to the failure of the bank the State Banking Board settled with the witness on the basis of this bank book as to his deposits.

Cross-examination:

On the day the check was issued to Merkle & Co. the City of Sapulpa settled with all the creditors of the Southwestern Engineering Company and paid out in such settlement by check about thirty three thousand dollars. That on June 8th, witness had on deposit in the water bond fund $28,053.44, and all checks which were issued to the creditors of the Southwestern Engineering Company on the water works contract were drawn against this fund. That about the time the checks were issued to these creditors there was some trouble arising as to the right of the City to pay these creditors, which was taken up and discussed at the time.

IRA J. ANDERSON was called as a witness by the plaintiff, and being duly sworn, testified as follows:

That on June 8th, 1912, he was, and still is the City Clerk of the City of Sapulpa. That he is the custodian of the city records of the Mayor and Commissioners of said city. Witness presented the record which was offered in evidence showing that on June 8th, 1912, a resolution was introduced and voted upon and adopted authorizing and directing warrant to issue in favor of E. J. Merkle & Co. upon the water works fund for $10,429.16. Said warrant was read in evidence and witness stated he issued this warrant in accordance with the resolution; that the warrant was charged on the books against the
39 City Treasurer the same as other warrants in the usual course of business and was cancelled and returned as other paid warrants.

B. B. BURNETT was called by the plaintiff as a witness, and first being duly sworn, testified as follows:

That on June 8th, 1912, he was cashier of the Farmers and Merchants Bank at Sapulpa; that the check for $10,429.16, drawn by the City Treasurer of Sapulpa upon that bank, was on that date presented to the bank by L. J. Roach, attorney for E. J. Merkle & Co. for payment and was paid by the bank on that date. That said check was payable to E. J. Merkle & Company or order. That the two certificates of deposit for thirty nine hundred dollars each, sued on in this case, were on that date issued by the bank in part payment of the above check, and the balance of the check was paid in cash. That the transaction occurred in the bank in the City of Sapulpa. That the amount of money which the two certificates of deposit represented remained in the bank and was not taken out of the bank from the time the certificates were issued until the bank closed. The two certificates of deposit were offered in evidence, being Exhibits A and B attached to the second amended bill herein, and same are made a part hereof the same as if incorporated herein.

Cross-examination:

That at the time these checks were presented for payment several other checks of creditors of the Southwestern Engineering Company were also presented by L. J. Roach and no objection was made to paying any of them in cash when they were presented. That shortly before these checks were presented a receivership proceeding against the Southwestern Engineering Company was instituted. Witness did not recall having any conversation with Roach in which the witness stated to Roach that "I caused this receivership proceeding to be filed and I can have it dismissed," if the creditors of the Southwestern Engineering Company would accept payment of their checks in part cash and the balance in certificates of deposit." Witness stated he did not institute the receivership, and was not
40 handling it and no requirement was made by the bank of Mr. Roach with reference to the payment of the checks.

Q. You advised the plaintiff in this suit, Mr. Burgess, to file that petition for a receiver, did you not?

A. I don't know that I did.

Q. Didn't you testify that you did when you were being examined in the bankruptcy court in the Eastern District recently?

A. Well, I am not positive about that, whether I did or not.

Q. It's possible that you advised him to file that suit isn't it?

A. I think I testified over there along this line: that Mr. Burgess was a customer of mine, and this Southwestern Engineering Company owed him some eleven or twelve hundred dollars, and he advised with me about the matter, and thought he was going to lose his money, and he advised with me about how to proceed to get it.

Q. And you advised him to file this suit?

A. I advised him, I think, to file a suit of some kind that would insure him his money.

Q. You advised him to go to Mr. Lawrence, an attorney in Sapulpa, did you not, and get him to look after it for him?

A. I think I sent him to Mr. Lawrence.

Q. Mr. Lawrence is your attorney now, is he not?

A. Yes, in some matters.

Q. Didn't you advise Mr. Burgess later on to dismiss this suit?

A. I advised him, I think, to dismiss it if he got his money.

Q. How long was that after the suit was filed?

A. I don't think it was very long.

Q. About a week?

A. Just a few days.

Q. Meanwhile you had seen Mr. Roach, had you not, with reference to these claims of the creditors?

A. No, sir, I hadn't seen him with reference to any claims. I had seen him around a number of times.

41 Q. This receivership they had instituted over there had the effect of stopping these checks that were being issued by the City to the creditors, did it not?

A. That's my understanding.

Q. Had Mr. Roach been in to see you concerning the action during the time before you advised Mr. Burgess to dismiss?

A. I don't remember whether he had or not.

Q. You don't remember

A. He might have.

Q. What's that?

A. He might have. I am not positive about it.

The witness further testified there were issued several certificates of deposit by the bank in payment of checks of these creditors at that time. He didn't recall just how many. He thought some of the checks were in excess of a thousand dollars and were paid in full. He did not know how many. He recalled that Burgess was one of the creditors whose claim was more than a thousand dollars and whose check was paid in cash in full and he thought the Minnetonka Lumber Company's claim was paid in full for about a thousand dollars; he didn't know whether it was for seven hundred and some odd dollars or not, but thought it was for a thousand. Merkle & Co. was a foreign corporation that had no place of business in Sapulpa and the witness thought they had no certificates of deposit at his bank

prior to that time. Some of the creditors to whom certificates of deposit were issued may have carried accounts at his bank at that time, but he could not name one who did.

Redirect examination:

Witness was shown the bank book of C. J. Wurtzberger and said it was his bank book and the testimony given by Wurtzberger was correct. That this book was kept by the bank and showed his bank account and according to this book he had on deposit on June 8th, 1912, about $36,000.00. The bank received the amount of
42 the two certificates sued on of thirty nine hundred dollars each out of the check drawn by the City Treasurer, payable to E. J. Merkle & Co. for $10,429.16.

Recross-examination:

That the check was drawn on his bank and the payment of the check amounted to just a transfer on the records of the bank.

Q. The bank commissioner took charge of the Farmers and Merchants Bank about a couple or three months later, did he not?
A. Yes, sir.
Q. Prior to the time he took charge of the bank it was insolvent, wasn't it?
A. I did not think so.
Q. You didn't think so?
A. No, sir.
Q. You voluntarily turned over the bank to him did you not on the 10th of June?
A. Yes, sir.
Q. September, I mean. No objection made by you to his taking charge?
A. No, sir, objection made by him to taking it. He didn't want it; wanted us to keep running it.
Q. He realized the condition it was in?
A. I don't know.
Q. Did E. J. Merkle & Co. have an account at your bank prior to June 8th 1912?
A. I don't think they had any open account; they might have had an account there at times, but they didn't have any regular account.
Q. They had no general drawing account?
A. No, sir.
The witness further testified:
Q. When you say that money was paid on that check, you don't mean any cash was paid?
A. Yes, there was cash paid on the check.
43 Q. By whom was it paid?
A. Paid by the bank.
Q. By your bank?
A. Yes, sir.
Q. To your bank?
A. Paid by the Farmers and Merchants Bank to Mr. Roach.
Q. Well, the certificates of deposit were issued to Mr. Roach?

A. Yes, the certificates of deposit aggregated about seventy eight hundred dollars and the difference between that and the amount of the check was paid to Mr. Roach; some four or five thousand dollars, three thousand, I believe.

This was all the testimony plaintiff offered, and rested its case.

The defendant called JOHN G. ELLINGHAUSEN, who being duly sworn, testified as follows:

That he is an attorney in Sapulpa, and was called in by the City to advise them in a settlement between the city and the creditors of the Southwestern Engineering Company. He attended a conference between a large number of the creditors and the city officials, and Saturday evening an agreement was reached that the city would pay the creditors upon all of those having claims in excess of a thousand dollars putting up a bond against over payments. This was reached Saturday afternoon prior to June 8th. Mr. Roach was there, and on Monday morning the suit for a receiver instituted by Burgess was filed and that had the effect of stopping the payment of these creditors at that time. The city would not issue the checks until the dismissal of this suit. That Burgess' claim was perhaps eleven hundred dollars, and that they then offered to pay Burgess in full his claim if he would dismiss the receivership action. He refused this offer at this time and gave as his reason——

A. Why, he said that there were some other parties interested in the matter with him and he would have to see them before he could dismiss the action, saying that the matter was practically out of his hands. That the offer was not accepted by Burgess during any
44 of the time the witness was there or had anything to do with this matter.

The defendant called J. D. LANKFORD, who being duly sworn, testified: That he is Bank Commissioner of the State of Oklahoma. That he took charge of the Farmers and Merchants Bank the 9th day of September, 1912. That he has all the books of the Farmers and Merchants Bank of Sapulpa which are made up of accounts which were transferred thirty or sixty days before the time of his taking charge of the bank. That these are the only books of the bank he has. That the records showing all transaction- prior to that time are missing and he has no way of tracing what the transactions of the bank were prior to that time. That the Platte Iron Works Company were given an opportunity to appear before the Board and present their claim upon the certificates of deposit sued on, and did appear and submit their evidence to the board at that time and the board refused payment. The reasons for refusing payment of the claim were——

A. They were not in position to prove the claim, not having access to the books.

Q. Was there any other ground besides that?

A. Well, there had been some certificates of deposit which seemed to have been issued for debts of the officers of the bank; seemed to be such proof made to the banking board.

Q. Out of this bank?
A. Yes, sir.
Q. You stated these certificates you referred to the board had known were issued for the Burnetts personally or this bank?
A. Yes, sir.
Q. And they had no way, did they, of informing the-selves as to what the transactions of that bank were prior to the time of these books that they had showed?
A. They had no way of tracing these transactions, no.
45 Q. And that was the reason, was it?
A. That was the reason of not paying it.

Cross-examination:

Q. I understand you to say that the State Banking Board declined to pay the certificates of deposit sued on in this case because you or the state banking board had no way of ascertaining whether they were valid, legal deposits of that bank?
A. Yes, sir.
Q. That was the reason, was it?
A. Yes, sir.
Q. And if you had been furnished with competent legal proof that these certificates of deposit were issued in due course of business for a valid deposit you would have paid them.
A. That's the purpose of the board.
Q. Well, I say you would have paid them?
A. Yes, sir.
Q. Do you recall who appeared before your board with these two certificates of deposit sued on in this case?
A. I think you did.
Q. I appeared there representing the owners of these certificates of deposit, did I not?
A. Yes, sir.
Q. Do you recall that there was presented to your board and to you personally by me a certified copy of the record of the Commissioners of the City of Sapulpa, Oklahoma covering these transactions?
A. Yes, I remember that.
Q. Please examine the record that is here offered in evidence and say whether the copy furnished you was a certified copy of that record?
A. I think it was.
46 The witness testified further that he did not question the authenticity of this record, nor the statements of fact contained in it. That he accepted it as true. That the bank book of C. J. Wurtzberger, city treasurer, was presented at the time, showing the deposits which he had in the bank at that time and that Wurtzberger appeared and testified before the board to substantially the same facts as testified to by him in this cause, and testified he had on deposit in that bank June 8th, 1912 about $36,000.00, or a large amount of money in the water works fund. That he showed the bank book showing deposits in the regular course of business and that the witness did not question it. The witness is a banker, expe-

rienced in banking, and that the bank book seems to show on its face to have been made in the usual course of business, and made by accredited officials of the bank, so far as the witness knew.

That the city warrant was also presented to the board payable to Merkle & Co., for $10,429.16, and testified to by Wurtzberger as being genuine warrant issued in the regular course of business by the City of Sapulpa; and that there was also shown the check of June 8th, 1912 issued by Wurtzberger drawn on the Farmers and Merchants Bank, payable to Merkle & Co. for $10,429.16, and that the witness heard Wurtzberger testify the check was issued by him in the usual course of business. And that it went into his bank account and was charged back to him in the usual course of business. That he, the witness, did not question that statement, and that he heard him testify when these two certificates were presented that they were part of that check and paid out of it, and that statement was not questioned.

Q. Then please tell the Court upon what basis you reached any conclusion that these certificates of deposit did not represent actual deposits in that bank.

A. The books of the bank itself would be the best evidence.

Q. Isn't this book an original book of entry of the bank?

A. I don't know.

Q. Well, look at it.

A. Seems to be.

47 Q. You are a banker and understand banking and how banking is done, don't you? It purports to have the entries therein made by the officials of the bank itself, doesn't it?

A. It looks that way, yes, sir.

Q. And it purports to be a copy of the original entry of the bank, doesn't it? If the bank books were destroyed, isn't that an original bank book entry?

A. Well, if it was genuine in the first place I would say yes.

Q. Well, you said you didn't question it was not *it* testified to by the owner of it?

A. It looks regular.

Q. A reputable citizen of Sapulpa and the city treasurer?

A. Yes.

Q. You didn't question his integrity, did you

A. No.

Q. Well, tell us why, if you can, that isn't a legal deposit.

A. Well, it didn't have the books with which to trace the transaction.

Q. Don't this book trace the transaction itself?

A. I don't know whether the original credit was ever made in the bank books or not.

Q. Doesn't this trace the transaction itself?

A. No.

Q. Doesn't it show everything that the bank book would show if you had the bank book?

A. It's supposed to show it.

Q. This book is a copy of the bank book, isn't it, if its a correct book?

A. Yes, sir.

Q. That's all you would get if you got the bank's books, would be a copy of this book?

A. Would be to verify it.

Q. I say you would get a copy of this book, wouldn't you?

A. Yes.

48 Q. Then as I understand you the only reason for not paying this deposit was because the books of the bank are not in your possession. That is correct, isn't it?

A. Because the accounts have not been verified.

Q. I say the only reason you gave why this deposit is not a legal deposit is because you haven't got the bank books to prove it by?

A. Yes, that's true.

Redirect examination:

The witness states the bank books would show more than the individual book shows; would show the cash account, the discount account, and the re-discount account and that you cannot see the whole condition of the bank of *of* that transaction by looking at that one depositor's book. It was a question whether the city ever really had a deposit on the books of the bank by the banking board. According to the information of the board that money was supposed to go into the city deposit from the sales of bonds, and the board seemed to think it was doubtful if the proceeds of that sale ever went into the assets of the bank. The records which they had of that bank showed it had an unusual amount of outstanding certificates of deposit.

Q. And it was for all of those reasons, taken into consideration altogether, was it not, that this particular claim was turned down?

A. Yes, that had something to do with it.

Q. You don't know this book was genuine?

A. No, I don't know.

Q. All you can say is that it purports to be a deposit book?

A. Looks to be, seems to be.

Recross-examination.

The witness testified he, as State Bank Commissioner, paid Wurtzberger the amount of money this book shows he had on deposit there.

Q. Then why do you tell this court that isn't just as good evidence of Merkle's deposit as this is of Wurtzberger's deposit?

49 A. Well, the board thought that the fradulent transactions was in the certificates of deposit.

Q. The water fund was created by the sale of a bond issue, wasn't it?

A. I think so.

Q. And if you owned Wurtzberger any money under that water bond fund it was acquired by the sale of these bonds?

A. Yes.

Q. Then why did you pay Wurtzberger the money out of that fund as shown by this book of the bank?

A. Well, the board advised it.

Redirect examination:

The board had no reason to doubt the water fund subsequent to June 8th had been increased according to the way that book shows it did. It was the deposits prior to June 8th, which were checked out by these checks that they had heard rumors with reference to.

Recross-examination:

Q. Do I understand you to say or to claim that any part of the funds arising from the sale of the bonds didn't go into that assets?

A. No, sir, you don't understand me to say that.

Q. Well, is it true?

A. I don't know.

Q. Didn't you investigate and find out whether Wurtzberger as city treasurer received and accounted for every dollar of this and didn't I furnish you with certified copy of the check that paid for these bonds by Sullivan and Company in Kansas City and didn't you use that for the purpose of checking up and finding out whether the money went in there or not? Don't you recall that, sir?

A. I don't just recall that; probably you did.

Q. And didn't you take it up with Wurtzberger and find out where the water bond fund was created and how it was created?

A. No, I didn't.

Q. And after you did that didn't you pay him exactly to
50 the cent what this book shows was due him?

A. I think he has been paid all except some coupons.

The defendant called L. J. ROACH, who being duly sworn, testified as follows:

That he was a practicing attorney at Muskogee and represented E. J. Merkle & Co. in the matter of the settlement of this claim against the Southwestern Engineering Company. Merkle was present personally at the conference referred to by the witness Ellinghausen. When the check of $10,429.16 was issued by the city to Merkle, it was delivered to him, the witness, who at that time represented several other creditors in this matter. He presented the check in question to Bates Burnett at the Farmers and Merchants Bank and received therefor in payment two certificates of deposit sued on here and the balance in cash. About four creditors witness represented had claims exceeding a thousand dollars and on these he received 25% in cash and balance in certificates of deposit. Perhaps on one he received 33⅓% cash. None of his clients were residents of Oklahoma. The order of appointment of the receiver in the suit filed by Burgess reached the treasurer's office in the city of Sapulpa early Monday morning, the time when creditors were gathering there expecting to get their money. The city then refused to issue the checks to the creditors. Witness was not acquainted with

Burnett at the time and had no conversation with him with reference to the receivership suit for three or four days thereafter. He had no agreement with Burnett during the latter part of the week that the suit should be dismissed. Burnett told witness he had no control of the suit. Told him that he had nothing to do with it and that he didn't know whether anything could be done with it or not.

Q. Why did you receive payment of the checks for your clients in this manner?

A. In this particular case I accepted 25% in cash and the balance in certificates of deposit because Merkle, my client, instructed me that that would be satisfactory. I communicated with him
51 by telephone.

Q. Weren't you forced to receive it that way or not get it at all?

A. No, sir.

Q. You were not?

A. No, sir.

The defendant here rested its case.

The plaintiff recalled C. F. WURTZBERGER who testified: That the water fund was created by the sale of bonds by the City. The water works bonds were paid for in cash by J. R. Sullivan & Company of Kansas City and the money deposited in the Farmers and Merchants Bank this fund remaining in that bank to the account of the city treasurer until it was checked out in the usual course of business. The money on deposit to the credit of that fund as heretofore testified was on June 8th, 1912, a part of that fund.

Witness gave the state banking board full information in regard to this water works fund after the bank closed and the impression got out the fund had no money in the bank. Witness went to Garnett, who was in charge of the bank for the state banking board, and showed him his books and gave him full information which he did not question. Neither the state banking board nor J. D. Lankford ever questioned the information afterwards and settled with the witness on the basis of the information furnished, which is in accordance with the testimony heretofore given by this witness.

Cross-examination:

Q. Witness does not know of his own knowledge the actual money arising from the sale of these bonds went into the bank. I know that I got credit there on this account.

52 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,
vs.
J. D. LANKFORD, Bank Commissioner, et al., Defendants.

The foregoing statement of the evidence was presented in behalf of the plaintiff for approval, January 27, 1914, the plaintiff appearing at the time by Charles A. Loomis, its attorney, and the defendants appearing at the time by their attorney, Jos. L. Hull, Assistant Attorney General, and thereupon the objection of the defendants to the inclusion of the evidence in the transcript of the record was overruled.

Thereupon the defendants objected to said statement of the evidence for the reason that the same does not include a letter offered in evidence as an exhibit to the testimony of the witness L. J. Roach and excluded at the trial by the court; and said objection was overruled.

It is now ordered that the foregoing statement of the evidence be and it is hereby approved as true and complete and properly prepared as a part of the record for the purposes of the appeal in this cause.

February 16, 1914.

JOHN H. COTTERAL,
Judge U. S. District Court, Western District of Oklahoma.

Endorsed: No. 1. Platte Iron Works vs. J. D. Lankford, et al. Condensed Statement of Evidence. Lodged in Clerk's office Jan. 27, 1914. Arnold C. Dolde, Clerk. Filed Feb'y 16, 1914. Arnold C. Dolde, Clerk By M. V. Haws, Deputy.

53 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.
J. D. LANKFORD, Bank Commissioner; JOHN J. GERLACH, W. F. Barber, and A. D. Kennedy, Composing the Oklahoma State Banking Board, Defendants.

Bond.

Know all men by these presents: That we, J. D. Lankford, as Bank Commissioner of the State of Oklahoma, and John J. Gerlach, W. F. Barber and A. D. Kennedy, as members of the State Banking Board

and Colin S. Campbell and R. C. Stuart, as sureties, acknowledge ourselves to be jointly indebted to the Platte Iron Works Company, a corporation, appellee, in the above cause, in the sum of $500.00, conditioned:

That whereas, on the 7th day of January, A. D. 1914, in the District Court of the United States for the Western District of Oklahoma, in a suit pending in that court, wherein the Platte Iron Works Company was plaintiff and J. D. Lankford, John J. Gerlach, W. F. Barber and A. D. Kennedy were defendants, appearing on Equity Docket as Number One, a decree was rendered against the said J. D. Lankford, as Bank Commissioner of the State of Oklahoma, and John J. Gerlach, W. F. Barber and A. D. Kennedy, as members of the Oklahoma State Banking Board, and said defendants having obtained an appeal to the Supreme Court of the United States and a citation directed to the said The Platte Iron Works
54 Company, a corporation, citing and admonishing it to be and appear in the Supreme Court of the United States within thirty days after issuance thereof.

Now if the said J. D. Lankford, as Bank Commissioner and John J. Gerlach, W. F. Barber, and A. D. Kennedy, as members of the Oklahoma State Banking Board shall prosecute their appeal to effect, and answer all costs of they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

J. D. LANKFORD,
As Bank Commissioner of the State of Oklahoma.
W. F. BARBER,
JOHN J. GERLACH,
A. D. KENNEDY,
As Members of the Oklahoma State Banking Board,
Principals.
COLIN S. CAMPBELL,
R. C. STUART,
Sureties.

Approved this 6th day of February, 1914.

JOHN H. COTTERAL,
Judge United States District Court.

Endorsed: In Equity. No. One. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, Complainant, vs. J. D. Lankford, Bank Commissioner, John J. Gerlach, W. F. Barber, A. D. Kennedy, composing the Oklahoma State Banking Board, Defendants. Bond. Filed Feb'y 6, 1914. Arnold C. Dolde, Clerk. By M. V. Haws, Deputy.

55 UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, Clerk of the District Court of the United States of America, for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the plead-

ings, record and proceedings in said court in case No. 1, wherein The Platte Irown Works Company, a corporation is plaintiff, and J. D. Lankford, et al., are defendants, as full, true and complete as the said transcript purports to contain and as called for by the præcipe for transcript of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Guthrie in said District, this 19th day of February, A. D. 1914.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk United States District Court,
Western District of Oklahoma,
By M. V. HAWS, *Deputy.*

Endorsed on cover: File No. 24,080. W. Oklahoma D. C. U. S. Term No. 929. J. D. Lankford, John J. Gerlach, W. F. Barber, and A. D. Kennedy, composing the state banking board of the State of Oklahoma, appellants, vs. Platte Iron Works Company. Filed March 5th, 1914. File No. 24,080.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1913.

J. D. Lankford, Bank Commissioner of the State of Oklahoma, et al.,
Appellants,

vs.

Platte Iron Works Company, a Corporation,
Appellee.

No. 381

APPLICATION TO ADVANCE.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

THE HARLOW-RATLIFF PRINTING CO., OKLA. CITY

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1913.

J. D. Lankford, Bank Commissioner of the State of Oklahoma, et al.,
Appellants,

vs.

Platte Iron Works Company, a Corporation,
Appellee.

No. 929.

APPLICATION TO ADVANCE.

Come the appellants by their solicitor, Chas. West, Attorney General of the State of Oklahoma, and pray the Court to advance this appeal for argument and submission.

THE CASE

Appellee seeks to compel appellants in their official capacity to pay an alleged deposit in a failed state bank, out of the Depositors Guaranty Fund of the State of Oklahoma, or a warrant in lieu. Appellants are the Banking Board and State Bank Commissioner, and object to the order made because:

1. Judicial compulsion set in motion against appellants as agents of the State as to the disposition of the State's property is an action against the state without its consent because the fund is a state fund.

2. Because the Court's order to pay or draw a warrant is one of mandamus allowed when the same is not ancillary to a judgment already obtained.

3. The law gives no justiciable right to a depositor to sue the appellants but appellants' acts thereunder are governmental acts within their administrative discretion.

4. Whether appellee is a depositor is a mixed question of law and fact and the appellants' determination thereof can only be set aside upon allegations of fraud, such as are not contained in the bill.

REASONS FOR ADVANCING.

The questions involved are of great public importance to the people of Oklahoma, and particularly to the Banking Department. Numerous causes are pending involving the questions in this appeal, in which the interference by the courts with the administration of the Depositors' Guaranty Fund is sought. This seriously impairs the efficiency of the administration of the fund, not only by reason of the great expense for defending these cases, but also because of the loss of public confidence in the effectiveness of the Guaranty Fund Law, which so much litigation naturally causes. Furthermore, owing to contradictory decisions of the lower courts, there is much doubt and confusion regarding the duty of appellants in administering the fund. For instance, the United States District Court for the Eastern District of Oklahoma has held just the reverse of the decision in this cause. The following cases will be determined by a finding in this cause that this suit is prohibited by the Eleventh Amendment.

In the Federal Court for the Western District of Oklahoma:

J. E. Ledbetter, Guardian, v. *Lankford et al.;*

First Nat. Bank of Carthage v. *Lankford, et al.;*

First Nat. Bank of Joplin v. *Lankford et al.;*

William Wallace v. *Lankford et al.;*

T. C. Hayden v. *Lankford et al.;*

Thos. J. Roney, Admr., v. *Lankford et al.*

In the Federal Court for the Eastern District of Oklahoma there are two cases involving this question, to-wit:

American Water Softener Co. v. *Lankford et al.;*

Farrish v. *Lankford et al.*

And the following cases involving similar questions pending in the Supreme Court of Oklahoma:

Schroeder v. *Lankford et al.;*

Okla. Bankers Trust Co. v. *Lankford et al* (2 cases);

Lovett et al v. *Lankford et al.*

The defense of all of these actions requires the

expenditure of large sums besides constant attention from the officers of the State.

THE LEGAL QUESTIONS INVOLVED.

1. The determination of whether or not plaintiff was a depositor, entitled to share in the Depositors Guaranty Fund involves the exercise of official discretion, with which the courts will not interfere.

Decatur v. *Paulding,* 14 Pet. 497; 10 L. Ed. 559;

U. S. v. *Guthrie,* 17 How. 284; 15 L. Ed. 10.

2. A transferee of a time certificate of deposit is not a depositor.

Magee on Banks and Banking, 371-3.

3. This fund being a state fund (*State* v. *Cockrell,* 27 Okla. 630, 112 Pac. 1000; *People* v. *Walker,* 21 Barb. 630, 642) the state having a lien upon the assets of a failed bank for its benefit (*Lankford* v. *Okla. Eng.* & *Ptg. Co.,* 35 Okla. 404; 130 Pac. 278) an action to compel payment out of it by the officers in charge thereof, is one against the State of Oklahoma without its consent.

Smith v. *Reeves*, 178 U. S. 436;

Murray v. *Wilson Distilling Co.*, 212 U. S. 151;

In re Ayres, 123 U. S. 443;

Louisiana v. *Jumel*, 107 U. S. 711;

Cunningham v. *Macon & B. Ry. Co.*, 109 U. S. 446;

Pennoyer v. *McConnaughty*, 140 U. S. 1.

4. The action is one for mandamus not ancillary to judgment rendered. The prayer of the bill of complaint is as follows:

> "In consideration whereof, for as much as the plaintiff is remedyless in the premises, and is by the strict rules of common law, only relievable in a court of equity, where matters of thiss nature are cognizable, the plaintiff prays that upon a final hearing of this cause, a decree be entered herein, ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit, and interest thereon, and is entitled to have the same paid out of the Depositors Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board of the State of Oklahoma, composed of John J. Gerlach, A. D. Kennedy and W. F. Barber defendants herein; and in case the depositors Guaranty Fund on hand is insufficient to pay the depositors of said bank, and other indebtedness chargeable against same, this plaintiff be and is entitled to have issued to plain-

tiff certificate of indebtedness to be known as "Depositors Guaranty Fund warrants of the State of Oklahoma" to liquidate said deposit and said certificates of deposit; and the said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing said State Banking Board of the State of Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon, out of the Depositors Guaranty Fund, and if there are not sufficient funds in the Depositors Guaranty Fund available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiffs certificate of indebtedness for the amount of such certificates of deposit, to be known at "Depositors Guaranty Fund Warrants of the state of Oklahoma" bearing six per cent interest as provided by Section 3 of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last Session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board, be ordered, commanded and required to levy an assessment against each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpoes of increasing such depositors guaranty fund and paying said deposit, and said certificates of indebtedness, known as "Depositors Guaranty Fund Warrants of the State of Oklahoma" and for such other and further relief as shall seem meet and agreeable in equity and good conscience."

And the decree rendered thereon is as follows:

"Now on this 7th day of January, 1914, this cause coming on to be heard, unon the second amended bill of complaint of the plaintiff, and the answer of the defendants; the parties appearing in person and by their attorneys, and all and singular the matters in issue were submitted to the court, and the court having heard the evidence and being fully advised in the premises;

It was ordered, adjudged and decreed by the Court that on June 8th, 1912 E. J. Merkle & Company deposited in the Farmers & Merchants Bank of Sapulpa, Oklahoma, seventy-eight hundred Dollars ($7,800.00) and accepted and received from said bank as evidence of said deposit the two certificates of deposit described in the first and second counts of plaintiff's second amended bill of complaint, and that thereafter and before the maturity of said certificates of deposit the plaintiff acquired said deposits and said certificates of deposit from said E. J. Merkle & Company by purchase for value, and is now the owner and holder of said deposits and said certificates of deposit.

The Court further finds, adjudges and decrees that the plaintiff as holder and owner of said deposits and said certificates of deposit, is entitled to have said deposits and said certificates of deposit allowed by the State Banking Board of the State of Oklahoma as a valid claim against the depositors guaranty fund of the State of Oklahoma, and is entitled to have said deposits paid out of the depositors guaranty fund of the State of Oklahoma on an equal basis with all depositors of failed banks in said State, and if at any time the depositors guar-

anty fund on hand shall be insufficient to pay the depositors of failed banks, o rother indebtedness properly chargeable against the same that plaintiff be and is entitled to have the State Banking Board of Oklahoma issue to plaintiffs certificates of indebtedness to be known as 'd·e positors guaranty fund warrants of the State of Oklahoma,' and that plaintiff is entitled to interest on said certificates of deposit at three per cent per annum until September 10, 1912, and six per cent per annum thereafter to this date.

It is further ordered, adjudged and decreed by the Court that plaintiff have and recover of an from the defendants J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, as members of the State Banking Board of the State of Oklahoma, the sum of $4,241.25 on the first count in plaintiff's second amended bill of complaint, and that the same be paid out of and from the depositor's guaranty fund of the State of Oklahoma. And if the depositor's guaranty fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against it then by a certificate of indebtedness known as 'depositor's guaranty fund warrants of the State of Oklahoma' sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed by the Court that plaintiff have and recover of and from the defendant, J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, as members of the Banking Board of the State

of Oklahoma, the sum of $4,241.25 on the second count of plaintiff's second amended bill of complaint, and that the same be paid out of the depositor's guaranty fund of the State of Oklahoma. And if the depositor's guaranty fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against it, then by certificate of indebtedness known as 'depositor's guaranty fund warrants of the State of Oklahoma' sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed that the plaintiff recover of and from the defendants J. D. Lankford, John J. Gertach, A. D. Kennedy and W. F. Barber, as members of the State Banking Board, its costs in this action."

This in effect is mandamus.

Farmers Nat. Bank v. *Jones,* 105 Fed. 459.

The lower courts had no jurisdiction thereof.

U. S. ex rel Knapp v. *Lakeshore & M. S. Ry. Co.,* 197 U. S. 540, 49 L. Ed. 870;

Covington etc. Bridge Co. v. *Hager,* 203 U. S. 109, 51 L. Ed. 112.

Respectfully submitted,

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

J. D. LANKFORD, et al,
Appellants,

vs.

THE PLATTE IRON WORKS COMPANY,
a Corporation,
Appellee.

To the Platte Iron Works Company, a corporation, Appellee:

Notice is hereby given you that the foregoing application to advance this cause for argument and submission, will be submitted to the Supreme Court upon the second Monday after the date of this motion.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

Service of the foregoing notice, and receipt of copy thereof, and of foregoing motion to advance, is hereby acknowledged this ——— day of March, 1914.

.....
Solicitor for Appellee.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1914.

J. D. Lankford, John J. Gerlach, W. F. Barker, and A. P. Kennedy Composing The State Banking Board of the State of Oklahoma,

Appellants;

vs. No. [illegible]

Platte Iron Works Company, a Corporation,

Appellee.

Brief on Behalf of Appellants.

Appeal from United States District Court
For Western District of Oklahoma.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

Service of this Brief accepted this ..... day of
1914.

Solicitor for Appellee.

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INDEX TO CASES CITED.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1914

Brief on Behalf of Appellants

J. D. Lankford, John J. Gerlach, W. F. Barber, and A. D. Kennedy, composing The State Banking Board of the State of Oklahoma,

Appellants

vs.

Platte Iron Works Company, a Corporation,

Appellee

Appeal from United States District Court For Western District of Oklahoma.

CHAS. WEST,
Attorney General of Oklahoma.
Solicitor for Appellants.

THE CASE

There are three questions:

1. Is not a proceeding an original one in mandamus and thus beyond the jurisdiction of the lower court where the bill seeks a judgment against the members of the State Banking Board of Oklahoma *together with an order to pay same out of the Guaranty Fund of the State?*

2. May the State be sued by a depositor in a failed bank? Is not a suit against the Banking Board one against the State?

3. Is not the determination of who are in fact depositors in a failed bank a question of discretion in the Bank Commissioner of the State and as such beyond judicial control? Does the possession of a certificate of deposit preclude the board from determining that the particular holder was a creditor of the bank for a loan made it rather than a depositor within the protection of the guaranty law?

PROCEEDINGS IN THE CASE.

This cause was commenced in the District Court of the United States for the Western District of Oklahoma by the filing of a petition on the equity side of the court.

It is alleged in the bill that the plaintiff, the Platte Iron Works Company, a corporation, a citizen of Maine, is the transferee and holder of two certain time certificates of deposit issued by the Farmers & Merchants Bank of Sapulpa, Oklahoma, a State Bank, organized under the Oklahoma Banking Laws; that the defendants are members of the Oklahoma State Banking Board, and the defendant, J. D. Lankford is the State Bank Commissioner; that on September 10, 1912, the Bank Commissioner took charge of the Farmers & Merchants Bank of Sapulpa, and all of its assets and proceeded to wind up its affairs; that the plaintiff's certificates of deposit have not been paid; and that although demand has been made upon the State Banking Board and the State Bank Commissioner to pay the same out of the Depositor's Guaranty Fund of the State of Oklahoma, they have refused to do so, although it was their duty so to do.

The prayer of the bill is: "That upon a final hearing of this cause, a decree be entered

herein ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit and certificate of deposit and interest thereon, and is entitled to have the same paid out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board of the State of Oklahoma, composed of John J.Gerlach, A. D. Kennedy,and W. F. Barber, defendants herein; and in case the Depositors' Guaranty Fund on hand is insufficient to pay the depositors of said bank, and other indebtedness, chargeable against same, that plaintiff be and is entitled to have issued to plaintiff certificates of indebtedness, to be known as 'Depositors Guaranty Fund Warrants of the State of Oklahoma,' to liquidate said deposit, and said certificate of deposit; *and that said John J. Gerlach, A. D. Kennedy, and W. F. Barber, composing said State Banking Board of the State of Oklahoma, be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificate of deposit, to be known as "Depositors Guaranty Fund Warrants of the State of Oklahoma,' bearing six per cent interest, as provided by Section 3 of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amend-*

ed by Senate Bill No. 231, *passed at the last session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board be ordered, commanded and required to levy an assessment against the Capital Stock of each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpose of increasing such Depositors' Guaranty Fund, and paying said deposit, and said certificates of indebtedness, known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' and for such other and further relief as shall seem meet and agreeable in equity and good conscience*"

(See pages 8 and 9 of Transcript of Record).

A motion to dismiss this bill was filed by the defendants alleging: "*That the court has no jurisdiction of the subject of the action* on the persons of the defendants, said suit being one against the State of Oklahoma without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States." (See page 11 of Transcript of record).

This motion, the court overruled; to which order the defendants excepted. (See page 12, Transcript of record).

On January 7, 1914, the court rendered a final decree against the defendants which is as follows:

"Now, on this 7th day of January, 1914, this cause coming on to be heard upon the second amended bill of complaint of the plaintiff, and the answer of the defendants; the parties appearing in person and by their attorneys, and all and singular the matters in issue were submitted to the court and the court having heard the evidence, and being fully advised in the premises;

"It was ordered, adjudged and decreed by the court that on June 8th, 1912, E. J. Merkle & Company, deposited in the Farmers & Merchants Bank of Sapulpa, Oklahoma, Seventy-eight Hundred Dollars ($7,800.00) and accepted and received from said Bank, as evidence of said deposit the two certificates of deposit, described in the first and second counts of plaintiff's second amended bill of complaint; and that thereafter, and before the maturity of said Certificates of Deposit, the plaintiff acquired said deposits and said certificates of deposit from said E. J. Merkle & Company, by purchase, for value, and is now the owner and holder of said deposits and said certitficates of deposit.

"The court further finds, adjudges and decrees that plaintiff as the holder and owner of said deposits and said certificates of deposit, be and is entitled to have said deposits and said certificates of deposit allowed by the state banking board of the state of Oklahoma, as a valid claim against the depositors' guaranty fund of the state of Oklahoma, and is entitled to have said deposits paid out of the depositors guaranty fund of the State of Oklahoma, and is entitled to have said deposits paid out of the depositors' guaranty fund of the State of Oklahoma, on an equal basis with all depositors of failed banks in said state and if at any time the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against the same, that plaintiff be and is entitled to have the state banking board of Oklahoma issue to plaintiff certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants, of the State of Oklahoma,' and that plaintiff is entitled to interest on said certificates of deposit, at three per cent per annum until September 10, 1912, and six per cent per annum thereafter to this date.

"It is further ordered, adjudged, and decreed by the court that plaintiff have and recov-

er of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber as members of the state Banking Board of the State of Oklahoma the sum of $4,241.25 *on the first count in plaintiff's second amended bill of complaint, AND THAT THE SAME BE PAID OUT OF AND FROM THE DEPOSITORS' GUARANTY FUND OF THE STATE OF OKLAHOMA. And if the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as 'Depositors' Guaranty Fund Warrants of* the State of Oklahoma,' sufficient to liquidate *the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.*

"It is further ordered, adjudged, and decreed by the court that plaintiff have and recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber, as members of the State Banking Board of the State of Oklahoma the sum of $4,241.25 on the second court of plaintiff's second amended bill of complaint, *and that the same be paid out of the depositors' guaranty fund of the State of Oklahoma. And if the depositors' guaranty*

fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed that the plaintiff recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, as members of the State Banking Board its cost in this action.

JOHN H. COTTERAL, Judge."

From this decree, appeal was taken to this court. The court below over appellants' objection (See Transcript of record, page 30), ordered the evidence introduced on final hearing, included in the record. But it is needless to consider same, since the assignments of error go solely to the sufficiency of the bill, and the jurisdiction of the court.

SPECIFICATIONS OF ERROR.

First: The court erred in overruling defendant's Motion to Dismiss for the following reasons, to-wit:

1. That said suit was an original action for mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained.

2. Because said suit was in fact against the State of Oklahoma to which it had not given its consent and as such it was prohibited by the eleventh amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said state, all of which appeared on the face of the bill of complaint.

Second: The court erred in rendering final judgment in said action for the following reasons:

1. That said suit was an original action in mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment heretofore obtained.

2. Because said suit was in fact against the State of Oklahoma to which it had not giv-

en its consent, and as such it was prohibited by the eleventh Amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said State, all of which appeared on the face of the bill of complaint.

3. Because the second Amended bill upon its face stated no cause of action for the relief sought, or for any relief. (See pages 16 and 17 of Transcript of Record).

ARGUMENT

The Oklahoma Bank Guaranty Law

In 1907-8 the Oklahoma law was enacted creating a fund for the payment of depositors of failed banks. This fund was created by levying an assessment against all State Banks in Oklahoma. The validity of this law was questioned and this court held it a proper exercise of the police power of the State. Noble State Bank vs. Haskell, 219 U. S. 104.

The provisions of the law necessary to be considered in this cause are the following:

"The Banking Board shall be composed of the Bank Commissioner and three other persons, which persons shall be appointed by the Governor, by and with the advice and consent of the Senate, no one of whom shall be an officer or director in a National Bank. * * * * * * * * The members of the board, other than the Bank Commissioner, shall receive no compensation for their services, and they shall be paid their actual and necessary expenses incurred in the performance of their duties, the same to be paid out of the General Revenue Fund. The Bank Commissioner shall be chairman of said board. Said board shall have the

supervision and control of the Depositors' Guaranty Fund, and shall have the power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund.* * * * *

(Sec. 1, Ch. 22, Session Laws, 1913, p. 23).

"There is hereby levied against the capital stock of each and every bank organized and existing under the laws of this State an annual assessment equal to one-fifth of one per cent, and no more, of its average daily deposits during its continuance as a banking corporation for the purpose of creating a depositors' Guaranty Fund; * * * * Such fund so created shall be known as the Depositors' Guaranty Fund of the State of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this act."

(Sec. 3, Ch. 22, Sess. Laws 1913, p. 27).

"If at any time the Depositors' Guaranty Fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against the same, the Banking Board shall have authority to issue certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' in order to liquidate the deposits

of failed banks or any other indebtedness properly chargeable against said Depositors' Guaranty Fund."

(Id. p. 29.)

Section 303, Rev. Laws of Oklahoma, 1910, provides:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

The section 300 referred to in the forego-

ing was amended in 1913, so as to read as quoted above from Sec. 3, Ch. 22, Session Laws 1913.

THE ACTION IS AGAINST THE STATE OF OKLAHOMA.

It will be noticed that defendants are sued in their official capacity. The relief sought is such as could only be granted against them as officials of the State of Oklahoma. They have no personal interest in the litigation. Were they not officers of the State they could not in any way comply with the decree rendered. The bill seeks payment of the plaintiff's claim out of the Depositors' Guaranty Fund of the State of Oklahoma; and the prayer is for an order *compelling these State officers, having the control and management of this fund to pay the same out of this fund*, or if the cash available be insufficient to issue Depositors' Guaranty Fund Warrants in payment of same.

The Supreme Court of Oklahoma in construing the banking law, held, (1) that the Depositors' Guaranty Fund is a fund of the State, and (2) that the state had a first lien on the failed bank's assets to discharge whatever the State should advance for it.

(1). It said: "That the depositors' guaranty fund and the funds of a failed bank in the hands of a bank commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the state as the common school fund is also true."

State vs. Cockrell, 27 Okla. 630; 112 Pac. 1000.

(2). And further, that the state has a first lien upon the assets of a defunct bank for the benefit of the Depositors' Guaranty Fund, by virtue of Sec. 303, Rev. Laws of Oklahoma, 1910 (above quoted) and the effect of this statute is to make the State a preferred creditor until any deficiency created therefrom by payment of depositors is made up.

Lankford vs. Oklahoma Engraving Co., 130 Pac. 278.

So, we have in this case an effort to compel State officials, having the control and management of a fund of the State, to pay a claim which they have already refused to pay, either out of that fund, or by certificates of indebtedness issued under authority of the State.

In answer it is the contention of appellants that this law did not establish a contractual relation as between the Bank Commissioner, or the Banking Board and the depositor; that the

Banking Board and the Commissioner are executive officers, whose duty is to carry forward the police power of the State for the general welfare and that no action at law or equity in favor of a depositor was given by the statute against this board acting within the sphere of its duties. For the object of the law is to serve public not private rights. Whether or not the Oklahoma Act served a private or a public purpose was the very basis of the decision of this Court in Noble State Bank vs. Haskell, 219 U. S. 104. The contention of the Bank in that case as appears particularly in its motion for a rehearing (Sec. 219 U. S. 575) was that its private funds should not be taken to pay the private debts of other persons. At page 580, the case on rehearing, Mr. Justice Holmes, speaking for this court, says that the cases cited in the original opinion—

> "Were cited to establish, not that the property might be taken for private use, *but that, among the public uses for which it might be taken, were some which if looked at only in their immediate aspect, according to the proximate effect of taking, might seem to be private.*"

And in the original opinion at page 111, it is likewise said:

> "If then, the legislature of the State

thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. *Even the primary object of the required assessment is not a private benefit*, as it was in the cases above cited of a ditch for irrigation or a railway to a mine; but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand."

The essence of the law therefore is, not to establish a private right but to conserve public welfare; and, as such, no justiciable rights in the depositors are to be presumed to arise; the law was not primarily enacted to return to the depositor his money, but more properly to prevent the public injury by bank panics. Nowhere is there language used showing an intent to give to a depositor the right to sue.

The Bank Commissioner and the Banking Board exercise a high executive function in the management of the Bank Guaranty Fund. The control and administration of this fund of the State is placed in them. (Sec. 1, Ch. 22, Sess. Laws, 1913, above quoted). They are charged with the duty of seeing that it is used solely for the payment of depositors and other items properly chargeable against it. (See Sec. 6 Ch. 22,

Sess. Laws 1913, above quoted). It is their duty when a claim against this fund is presented, to determine whether or not, it is a proper charge. Necessarily in reaching such determination, they must decide questions of fact, and place a construction upon the law applicable to the case; and further they must bear in mind the purpose of the act, which is to secure public confidence in bank credits.

With the exercise of such a high executive discretion, the courts will not interfere. This doctrine was first announced by Chief Justice Taney, in Decatur vs Paulding, 14, Pet. 497, 10 L. Ed. 559. That was a case in which the Secretary of the Navy refused to pay from a pension fund a pension to a widow of a deceased naval officer, because under his construction of the law she was not entitled thereto.

We particularly call the attention of the court to the concurring opinion of Mr. Justice Catron, in which he says:

> "Every government is deemed to be just to its citizens; its executive officers equally with the judges of the courts are personally disinterested, and why should not their decisions be as satisfactory and final, they must be final, in most instances, in the nature of things, and the necessities of the government. * * * * To

> permit an interference of the courts of justice with the accounts and affairs of the treasury would soon sap its very foundation; money would not be drawn out according to its own rules, nor could the Secretary of the Treasury ever inform Congress of the amount needed. Congress would of necessity be compelled to consult the Court, not the Secretary, when making appropriations."

The question then resolves itself into this: Is an action to compel state officers to pay a claim from a state fund in their charge, which they, in the exercise of an executive discretion, refused to pay, an action against the State? We think there can be no doubt about the answer.

The supreme test in such case is whether the state is bound by the judgment or whether any of the funds under its control are so bound, and that test being applied there can be no doubt of the outcome in this case.

In the early case of Governor of Georgia vs. Madrazo, 1st Pet. 110, Chief Justice Marshall at page 123, stated the law.

In Smith vs Reeves, 178 U. S. 436, the plaintiff sought a decree compelling the state treasurer of California to pay from the funds in the treasury a sum, which they claimed was

unlawfully collected as taxes. This court in its opinion said that being one to compel the state to pay out money from its funds, it was one against the state.

See Re. Ayers, 123 U. S. 443.
Pennoyer vs McConnaughy, 140 U. S. 1, 10.
Louisiana vs Jumel, 107 U. S. 711.
Cunningham vs. Macon & Brunswick Ry. Co. 109 U. S. 446.

In Murray vs Wilson Distilling Co 213, U. S. 150 the plaintiff sought to compel the defendants constituting the State Dispensary Commission of South Carolina to pay a claim out of the proceeds from the dispensary assets. This Commission was appointed for the purpose of winding up the affairs of the State Dispensary. The act creating it, provided:

> "It shall be the duty of said commission to close out the entire business and property of the State Dispensary except real estate, and including stock in the several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof all just liabilities at the earliest date practicable."

It was contended by this act the State vested title to the assets in the commission, for

the benefit of creditors, and therefore, the action was not against the state. But this court decided to the contrary:

> " * * * * * we are of opinion that there is no just ground for the conclusion that the state, in providing by that legislation for the liquidation of the affairs of the state dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property, which placed so beyond the control of the state as to authorize a judicial tribunal to take the assets of the state out of the hands of those selected to manage the same."

That case, we think is conclusive of the issue in the case at bar. Here, as there, the State has placed the management of a state fund in the hands of a board of state officers; here, as there, the purpose of the fund is to pay certain claimants; here, as there, the State has selected that board, and no other tribunal to determine what claims shall be paid. The courts have no more jurisdiction in this cause than they had in that.

We respectfully submit that this cause is not one in which it is sought to move the officer through the state but on the contrary the state

is sought to be moved through its officers. Of this, the court has no jurisdiction, as it was in violation of the Eleventh Amendment to the Constitution of the United States.

THE ACTION IS FOR MANDAMUS, NOT ANCILLARY TO A PRIOR JUDGMENT.

The prayer of the bill is to establish the plaintiff's status as a depositor entitled to be paid from the Depositors' Guaranty Fund, and that the Banking Board "be ordered, commanded and required to pay said deposit and interest thereon out of the Depositors' Guaranty Fund; and if there are not sufficient funds in said Depositors' Guaranty Fund available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificates of deposit, to be known as 'Depositors' Guaranty Fund Warrants, of the State of Oklahoma;' bearing six per cent interest, as provided by Section 3 of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature of the State of Oklahoma." (See Transcript of Record p. 9)

The decree rendered first undertakes to establish the status of plaintiff as a depositor entitled to payment from the Depositor's Guaranty Fund; it then adjudges that plaintiff have and recover of the Banking Board the amounts sued for, "and that the same be paid out of and from the depositors' guaranty fund of the State of Oklahoma," and if the cash available be insufficient, the Board is commanded to issue Depositors' Guaranty Fund Warrants in payment thereof. (See Transcript of Record page 13.)

Although the petition is filed on the equity side of the court, and the order to pay is called a decree, we respectfully submit that the preceeding is nothing but an action for mandamus. The allegations of the bill attempt to set out the averments necessary for mandamus, namely, the plaintiff's right, the defendant's official duty, and the refusal to perform it.

The action cannot be considered as suit against trustees to subject a trust fund, for we have shown that by the decision of this court in Murray vs Wilson Distilling Co. supra, this fund being placed in the hands of agents of the State did not divest the State of title thereto, and authorize an action against the Board as trustees. Such an action would be against the state.

The action was in effect mandamus.

Farmers Nat. Bank vs Jones, 105 Fed. 459.

Not being ancillary to any judgment previously obtained, the Federal District Court had no jurisdiction thereof. This question was recently before this court, and was disposed of as follows:

> "We deem it settled beyond controversy until Congress shall otherwise provide that circuit courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States."
>
> Covington, etc. Bridge Co. vs Hager, 203 U. S. 109.
>
> And see United States, ex rel Knapp Lake Shore & Michigan So. Ry. Co. 197 U. S. 540.

This rule has been followed a number of times in the lower Federal Court.

When Mr. Taft was on the bench this question came before the Circuit Court of Appeals. In discussing it he said:

> " * * * * Even in states where by statute it is specifically provided that

a mandamus may be issued without other proceeding than an application for mandamus, such a statute does not apply to a circuit court of the United States and (that) in those cases a judgment against the corporation liable for the debt must be rendered before mandamus will issue."

Fuller vs Aylesworth, 75 Fed. 694, 21 C. C. A. 509.

See also

Jabine vs Oats, 115 Fed. 861.

Wiemer vs Louisville Water Co. 130 Fed. 246.

Large vs Consul & Nat. Bank 137 Fed. 165.

Pensacola vs Lehman, 57 Fed. 324; 6 C. C. A. 349.

Denton vs Barber, 79 Fed. 189, 24 C. C. A. 476.

Burnham vs Fields, 157 Fed. 248.

Gares vs. Northwest Nat. Bldg. Assn. 55 Fed. 210.

Indiana vs Lake Erie etc. Ry. 85 Fed 3.

Rule applies to district courts as well as circuit courts.

In Re Forsyth 78 Fed. 301.

We respectfully submit, therefore, that the court had no jurisdiction of this action.

THE PETITION SETS FORTH NO CAUSE OF ACTION.

This assignment raises the question of whether or not the transferee of a time certificate of deposit is a depositor, entitled to share in the Depositors' Guaranty Fund.

The plaintiff in this cause became the holder of the certificates of deposit sued on. These certificates were time certificates payable sixty days and three months after date respectively.

The weight of authority seems to be that a time certificate of deposit is in effect a promissory note. The plaintiff's cause of action was based upon its being a holder of a negotiable instrument issued by the bank. Its rights were the same as those of the holder of the bank's promissory note. It was not a depositor.

Magee, in his recent work on Banks and Banking (Second Edition) says:

> "If the law is settled that such instruments are promissory notes, the bank is, in effect, a debtor to the depositor for money borrowed and is not a debtor for deposits received." Page 371.

And on page 372, he says:

> "The weight of Authority so far, and at the present time, is that a certificate

of deposit issued by a bank agreeing to pay to the order of a person a sum of money on demand or in the future, the time being fixed, is in effect a promissory note. *If so, it is subject to the law governing negotiable notes and bills, as to presentment for payment, protest, etc.;* and if a promissory note, and the money represented by it is money borrowed by the bank, the statute of limitations, which in most of the States does not run against a deposit, would run against a certificate of deposit."

The Bank Guaranty Law was not enacted for the purpose of securing loans made to the bank; but to secure the currency of checks upon state banks, and to guaranty payment of deposits made in State Banks. We do not believe its purpose was to guarantee payment of loans to banks evidenced by time certificates of deposit.

For the reasons above given we believe the court below erred in rendering the decree in this cause; and the same should be reversed and set aside, and the case dismissed.

Respectfully submitted,

CHAS. WEST,

Attorney General of Oklahoma

Solicitor for Appellants

IN

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914.

J. D. Lankford, John J. Gerlach, W. F. Barber and A. D. Kennedy, Composing the State Banking Board of the State of Oklahoma,
Appellants,
vs.
Platte Iron Works Company, a Corporation,
Appellee.

No. 381

SUPPLEMENTAL BRIEF FOR APPELLANTS.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

Service of copy of above accepted this Oct....., 1914.

Solicitor for Appellee.

IN

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Platte Iron Works Company, a Corporation,
Appellee.

No. 381

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Since filing our original brief in this cause, the Supreme Court of Oklahoma, on September 29, 1914, decided the main questions involved in this

appeal. That decision is, we think, conclusive of the case at bar since it holds that the Guaranty Fund is a fund of the State, and that the Banking Board exercises a discretion in determining who are entitled to payment from this fund. We give the opinion in full in the appendix to this brief.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

APPENDIX

IN THE

SUPREME COURT

OF THE

STATE OF OKLAHOMA

Charles W. Lovett, D. Beardsley, and J. J. Sisson, County Commissioners of Creek County, State of Oklahoma,
Plaintiffs in Error,
vs.
J. D. Lankford, W. F. Barber, A. D. Kennedy and John J. Gerlach, Composing the Banking Board of the State of Oklahoma, and Farmers & Merchants Bank of Sapulpa, Oklahoma,
Defendants in Error.

No. 6059

SYLLABUS.

1. Plaintiffs in error presented their claim to the Bank Commissioner and the Banking Board, demanding payment out of the depositors' guaranty fund. Payment was denied upon the ground that such deposit was not protected by said fund. Thereupon petition for writ of mandamus was filed in

the District Court of Oklahoma County. Alternative writ was issued, which, on final hearing, was discharged, and error is prosecuted to this Court. HELD: That the Bank Commissioner and the Banking Board are a part of the executive branch of the State government, and a suit in mandamus, seeking to compel said officers in their official capacity to allow and pay said claim out of the depositors' guaranty fund, is a suit in effect against the State, and cannot be maintained without the consent of the State.

2. The Bank Commissioner and the Banking Board constitute a part of the executive branch of the State government, and the duties devolving upon said officials require the exercise of judgment and discretion. HELD: In the absence of allegation and proof of fraud, or arbitrary action, their decision in a matter within their jurisdiction will not be reviewed or controlled by a writ of mandamus.

3. The facts in this case examined and HELD to bring the case within the rule announced by this Court in the case of Columbia Bank & Trust

Company v. United States Fidelity & Guaranty Company, 33 Okla. 535

ERROR FROM THE DISTRICT COURT OF OKLAHOMA COUNTY.

Hon. Geo. W. Clark, Trial Judge.

Affirmed.

V. S. Decker, County Attorney of Creek County; Dale & Bierer, Wm. T. Hutchings and Ledbetter, Stuart & Bell,
Attorneys for Plaintiffs in Error.

Charles West, Attorney General, and Jos. L. Hull, Assistant Attorney General,
Attorneys for Defendants in Error.

* * * * * * * * *

Opinion of the Court by Riddle, J.:

This proceeding in error is prosecuted from a judgment of the District Court of Oklahoma County in favor of defendants. Plaintiffs, as commissioners of Creek County, filed their petition in the District Court against the State Banking Board and the Farmers & Merchants Bank of Sapulpa, praying for a writ of mandamus. Defendants filed their answer to the alternative writ of mandamus, and upon the issues thus made the court rendered judgment in favor of defendants, discharging the alternative writ.

It is alleged in the petition that the county treasurer of Creek County, on the 10th day of September, 1912, had on deposit in the Farmers & Merchants Bank the sum of $106,258.26, $77,435.01 being deposited to the credit of the treasurer of Creek County, and $28,823.25 was deposited in the name of the treasurer, as a special deposit; that said bank was at the time subject to the provisions of the Bank Guaranty Law of the State of Oklahoma; that said bank failed on the 10th day of September, 1912, while said funds of said county were on deposit; that defendant, Lankford, as State Bank Commissioner, took charge of said bank and its assets; that plaintiffs demanded payment of said deposit from said Banking Board out of the Depositors' Guaranty Fund; and that in the event there was not sufficient funds to pay same, that the Board issue a certificate of indebtedness covering same; that the Banking Board refused to pay same, or to issue a certificate of indebtedness. They prayed for a peremptory writ of mandamus, requiring said Board to pay the amount of said deposit, or to issue a certificate of indebtedness for same.

An alternative writ of mandamus was allowed,

setting out the foregoing state of facts. Defendants deny (1) the jurisdiction of the court; (2) aver that the alternative writ did not state facts sufficient to entitle plaintiffs to the relief prayed. The second ground in the answer was sustained by the court, and judgment rendered, discharging said alternative writ.

Plaintiffs in error allege, first: That the court erred in refusing the peremptory writ of mandamus. Second, in overruling motion for a new trial. Several other errors are alleged, but they all relate to one proposition. The questions presented for our determination are: (1) Is this suit in effect a suit against the State. (2) If such deposit was protected by the Depositors' Guaranty Fund, is a writ of mandamus a proper remedy to secure the relief sought by plaintiffs? (3) Was the deposit in the name of the treasurer of Creek County in the Farmers & Merchants Bank of Sapulpa, at the time it failed, protected by the Depositors' Guaranty Fund?

It is contended by counsel for plaintiffs that the last two questions must be answered in the affirmative, and the first, in the negative; while

counsel for defendants in error contend that the first must be answered in the affirmative, and the last two in the negative. Counsel for the respective parties have filed elaborate and able briefs in support of their contentions. These questions require the construction of the section of the statute relating to the deposits protected by the Depositors' Guaranty Fund, and the authority conferred upon the Banking Board, and the character of duties required to be performed by them.

The first question is: Is this suit, in effect, a suit against the State? If this question may be answered in the affirmative, it will be conceded, we presume, that it cannot be maintained without the consent of the State. If defendants in error may be considered executive officers of the State, and in performing their duties in administering the law under consideration, do so as such officers, and the property entrusted to their control and management by the law is property owned by the State, or property in which the State has a substantial interest, then it can hardly be questioned that this suit, in effect, is against the State. It was said by this Court, in the case of State ex rel. v. Cockrell, 27 Okla. 630:

"That the Bank Commissioner is a state officer, has not been and cannot be questioned. That the depositors' guaranty fund, and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the state as the common school fund is also true. The depositors' guaranty fund act was sustained by this Court on the theory of the reserved power of the state to alter and amend charters of state banking corporations for the public welfare (citing authorities). This power exercised for the public welfare by the legislative act which causes to be levied the assessment 'against the capital stock of each and every bank or trust company organized or existing under the laws of this state * * * equal to five per centum of its average daily deposits during its continuance in business as a banking corporation,' for the purpose of protecting the depositors of such banks * * * is the same as that which levies or causes to be levied as tax upon the people and property within the state for the maintenance and support of the common school and educational institutions. The title of such depositors' guaranty fund vests in the State just as much so as the common school lands, or the proceeds of the sale of them, and the taxes levied and collected for the maintenance and support of said schoools, all of which are held in trust by the state for a specific purpose."

In addition to the act of the legislature, creating the Banking Board and prescribing its duties, it is specifically provided that the State shall have

a first lien upon all the assets of the bank, including liability of the individual stockholders.

In the case of Pennoyer v. McConnaughy, 140 U. S. 1, the court states the rule as follows:

> "The principle stated by Chief Justice Marshall (in that case) that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the Eleventh Amendment is limited to those suits in which the state is a party to the record,' has been qualified to a certain degree in some of the subsequent decisions of this court, and now it is the settled doctrine of this court that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit. * * * 'The objections to proceeding against state officers by mandamus or injunction are: First, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter."

Louisiana v. Jumel, 107 U. S. 711; Miller v. Raum, 133 U. S. 200; Smith v. Reeves, 178 U. S. 436, 36 Cyc. 915.

It cannot be questioned that a judgment in this case in favor of plaintiffs in error would directly affect the state, and would, in effect, be a judgment against the state, and would require the subjection of state funds to satisfy said judgment. Therefore, it cannot be maintained. That this is a sound and just doctrine is clearly to be seen. If plaintiffs in this case can control the action of the Bank Commissioner and Banking Board in this proceeding in the discharge of their usual and ordinary duties in the manner provided by statute, in the execution of the law confided to their control, then, in principle, every other person or corporation, asserting a claim against this fund and presenting the same to the Banking Board, and such officials' duly act upon same and rule adversely to such claimant, could resort to the courts and not only have the court substitute its judgment for that of such officials, but would harass and create confusion, the effect of which would be to destroy the efficiency of such board. In a late case from the Supreme Court of the United States, Murray v. Wilson Distilling Co., 213 U. S. 151, the court had under consideration a question similar to the one now before us. That

case arose in South Carolina under a dispensary law, section 11 of which act provided:

> "That said commission is hereby declared to possess full power to pass upon, fix and determine all claims against the state growing out of dealings with the dispensary, and to pay for the state any and all just claims which have been submitted to and determined by it, and no other, out of the assets of the dispensary which have been, or may hereafter be, collected by said State Dispensary Commission: Provided, that each and every person, firm or corporation presenting a claim or claims to said commission shall have the right to appeal to the Supreme Court as in cases at law. * * *"

Chief Justice White, speaking for the court, said:

> "We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court without in effect deciding that the state can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that at least by indirection the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a state cannot, against the objection of the state, be maintained in a court of the United States. Thus, in Hagood v. Southern,

117 U. S. 52, wherein suits brought in a court of the United States against officers and agents of the State of South Carolina, the holders of certain revenue script of the state endeavored to enforce the redemption thereof according to the terms of the statute in pursuance of which the script was issued, which statute was alleged to constitute an ~~irreparable~~ irreparable contract. The court said: 'Though not nominally a party to the record, it (the state) is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject-matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another, or by citizens or subjects of any foreign state." * * * The absence in the winding-up act of a provision conferring authority to review in the ordinary courts of justice the action of the commission concerning claims, instead of supporting the contention that the state had abandoned all property right in the funds placed in the hands

of the commission, tends to a contrary conclusion, since it at once suggests the evident purpose of the state to confine the determination of the amount of its liability to claimants, to the officers or agents chosen by the state for that purpose. And it is elementary that, even if a state has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the state in a court of the United States."

In principle, the language quoted applies with all its force to the case at bar. The fact that the legislature failed to make any specific provision for review in the courts of the action of the Banking Board in the administration of the law in question, concerning claims against the depositors' guaranty fund, tends to prove the evident purpose of the state to confine the determination of and the validity of those claims and the question as to whether or not they are protected by this fund, to the officials composing the Board. From the foregoing, it is clear to our minds that the suit in question is, in effect, a suit against the State, and in the absence of the consent of the State, the same cannot be maintained.

The second question requires the consideration and construction of certain sections of the statute governing the State Banking Board and the Bank

Commissioner. Section 299, Rev. Laws, 1910, was amended by section 1 of chapter 22, Session Laws 1913, which provides as follows:

> "That Banking Board shall be composed of the Bank Commissioner and three other persons, which persons shall be appointed by the governor, by and with the advice and consent of the Senate, no one of whom shall be an officer or director in a national bank. Said three members shall hold office concurrently with the governor, and as soon as said members are appointed under the provisions of this act, the board shall select one of its members as treasurer. * * * The Bank Commissioner shall be chairman of said board. Said board shall have the supervision and control of the depositors' guaranty fund, and shall have the power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund."

The latter part of section 2 of this act provides that the Bank Commissioner shall execute a bond in the sum of $25,000, and each member of said board shall execute a bond in the sum of $5,000 for the faithful performance of his duty.

The latter part of section 3 of the amendatory act provides for a levy of certain assessments, and then provides:

> "Such fund so created shall be known as the Depositors' Guaranty Fund of the State

of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this act."

Certain other provisions are made, which are not material here.

Part of section 300 Rev. Laws 1910 provides:

"If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all banks which have failed, having valid claims against said depositors' guaranty fund, the State Banking Board shall issue and deliver to each depositor having any such unpaid deposit a certificate of indebtedness for the amount of his unpaid deposit, bearing six per cent interest."

The above section has been amended by section 3, chapter 22, Session Laws 1913, which provides for the issuance of certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma."

Rev. Laws 1910

Section 309, provides:

"Whenever any bank or trust company organized or existing under the laws of this state shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this state

shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

Section 303 provides:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to take up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

Section 304 provides that the Bank Commissioner shall take charge of books, records, and

and assets of every description of such bank or trust company and collect debts, dues and claims belonging to it, and upon order of court may compromise or settle such claims and sell certain property belonging to such bank and enforce a personal liability of its stockholders. In considering sections 300 and 303, together, it will be seen that the law has specifically confided to the banking board and the Bank Commissioner the duty and authority to determine the validity of claims against the depositors' guaranty fund. By this section, it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund. Lankford v. Okla. Engrav. & Printing Co., 35 Okla. 404.

In the case of State ex rel. v. Cockrell, supra, this court again stated:

> "The State Bank Commissioner, or the banking department, is a part of the executive department of the state, and is entrusted with the receipt, custody and disbursement of funds of failed banks."

Thus, if defendants in error are part of the executive branch of the state, charged with the exercise of judgment and discretion in the administration of the law under consideration, their acts will not be controlled by mandamus. This is too well settled to now be an open question . And this is true, even where those duties require an interpretation of the law, and when there are no controverted facts. The rule is clearly stated in the case of United States ex rel. Dunlop v. Black, 128 U. S. 40, in the following language:

> "The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them. Judged by this rule the present case presents no difficulty. The Commissioner of pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if

the law were properly before us for consideration we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts. Brashear v. Mason, 6 How. 92; United States ex rel. Goodrich v. Guthrie, 17 How. 284; Commissioner of Patents v. Whiteley, 4 Wall. 522; Georgia v. Stanton, 6 Wall. 50; Gaines v. Thompson, 7 Wall. 347; United States ex rel. McBride v. Schurz, 102 U. S. 378; Butterworth v. Hoe, 112 U. S. 50; United States v. Lynch, 137 U. S. 280."

See also: Kimberlin v. Commissioner to Five Civilized Tribes, 44 C. C. A. 109; Norris v. Gross, 25 Okla. 287; County Commissioner v. State, 31 Okla. 196; Molacah v. White, 31 Okla. 693; Dunham, City Clerk of Guthrie v. Ardery, ... Okla. ..... (Not yet officially reported.)

Applying the doctrine stated in the quotation from the foregoing case, it renders the question presented here rather simple. Defendants in error constitute a part of the Executive department of the state. They are required to pass upon the validity of the claim in question, and as to whether it was protected by section 303, supra, and was

entitled to be paid out of the depositor's guaranty fund. They did not fail to pass upon the question presented to them, but they did decide it and construed the law adversely to the contention of plaintiffs, holding that such claim was not protected by the depositors' guaranty fund. It was their duty to construe the law and apply it to the facts before them. They evidently followed the construction and application of the statute by this court in the case of Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., supra. Their decision in this regard is upheld by us in this opinion. From the foregoing, it is clear that defendants constitute a part of the Executive Department of the State Government, and that they were vested with the exercise of discretion and judgment in the premises; and their action cannot be reviewed or reversed in a proceeding for writ of mandamus.

Approaching the third question raised: The conclusion we have reached upon the other two questions renders it unnecessary to consider and determine this question, although properly before us. We have carefully read the record and all that counsel have said in discussing this point, and

with much interest, listened to the oral argument, and have considered all in connection with the able and logical opinion in the case of Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co., supra., and to our minds, the facts of this case are so similar to the facts of that case, that in principle there can be no distinction made.

It cannot be seriously questioned that under the Bank Guaranty Law, as construed by this court in the case of Columbia Bank & Trust Company case, supra, no state funds deposited in the manner provided by law in any bank are protected by the bank guaranty fund. The principle distinction which can be made under the law governing the deposit of state funds and that of county funds is that the state treasurer, with the approval of the governor and attorney general, is to select the depositories for state deposits; and such depositories shall pay interest on the state funds at the rate of three per cent; and as additional security, the state treasurer is authorized to take first mortgage bonds on farm lands, but is prohibited from taking surety company bonds; while in making deposits of county funds, the county commissioners are to select the depositories and

are permitted to accept surety bonds, but are not authorized to accept first mortgage bonds on real estate. In the deposit of state funds, the governor, attorney general and the state treasurer are to approve the securities; in the deposit of county funds, a commission composed of the county judge, county attorney and county clerk shall pass upon and approve the securities. In principle, in construing and applying this provision of the law it will be seen that there can be no real distinction made between a deposit of state funds in a depository authorized to receive the same, and that of county funds; and this is true, whether this court in that case placed its decision upon the ground that the school fund there was otherwise secured, or on the ground that the statute providing for the deposit of the school funds was a specific provision relating to a special subject, and both acts were passed at the same session of the legislature, or if the deposit there was a special and not a general deposit, or if it was upon all the grounds mentioned. This court, in the Columbia Bank & Trust Company case, supra, in effect, held that the deposits of the state were not general deposits, covered and protected by the depositors' guar-

anty fund. So, we hold in this case that the same rule applies to the deposits of Creek County, made in pursuance to the provisions of the statute, prescribing and providing for ample securities, and directing them to be made under strict legislative safe-guards, does not come within the meaning of a general deposit, under section 1540 Rev. Laws 1910, protected and covered by the depositors' guaranty fund. Counsel approve the rule announced in the Columbia Bank & Trust Company case, and say that it is a proper construction of the section of the statute here under consideration; and to do so, is equivalent to an admission in advance that the conclusion we have reached on this point is likewise sound.

From the foregoing conclusion, the judgment of the trial court must be affirmed.

All the Justices Concur.

I. W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the syllabus and of the opinion of said court in the above entitled cause, as the same remains on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said Court, at Oklahoma City, this, the 30 day of September, 1914.

W. H. L. CAMPBELL, Clerk.

By.....

No. 381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

J. D. Lankford, John J. Gerlach, J. F. Barber and A. R. Kennedy, Comprising the State Banking Board of the State of Oklahoma - - - - - - - Appellants

vs.

Platte Iron Works, a corporation, - - - - - - - Appellee

BRIEF ON BEHALF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Howard Gray of Carthage, Missouri
Allen McReynolds, of Carthage, Missouri
Solicitors for The Platte Iron Works and parties similarly situated.

THE CARTHAGE DEMOCRAT JOB DEPT.

No. 381

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STATEMENT

The principal brief in this case is prepared and filed by Hon. Charles B. Loomis of Kansas City, Missouri, chief counsel of The Platte Iron Works Company. The following brief is prepared by counsel who represent parties who are similarly situated and whose cause is stipulated to abide the outcome of this case, the same question being in issue in all of the controversies. For the purposes of this brief counsel adopt statement made by Judge Loomis.

JOINDER IN ERROR

I

The proceedings at bar is not an original one in mandamus but proper relief which, under the constitution of the United States and the Constitution of the State of Oklahoma, is to be accorded to an injured party where state officers have failed to do their duty.

II

This action is not an action against the State. The defendants cannot seek shelter behind the state for the abuse of their discretion in office. This is true not only on account of the reasons assigned by Judge Loomis, but for the following constitutional reasons:

a. Section 55 of Article 5 of the Constitution of Oklahoma provides that no money can be paid out of the treasury of the state without an appropriation by law. It is admitted that the State Banking Board does not wait for legislative appropriation by law to pay out its funds, and appellee contends that no such appropriation is needed. That being true, the funds in the hands of the State Banking Board are not state money in the ordinary sense of the word but a special fund collected from limited sources, held in trust to be used for certain purposes.

b. Section 15 of Article 10 of the constitution of Oklahoma provides that the credit of the state shall not be given, pledged or loaned to any individual company,

corporation or association. If the State Banking Board was the state and the funds in its hands were state money in the general sense of the word, the state would surely be lending its credit to every state bank within its boundary and the guaranty law would be unconstitutional.

c. To hold that the State Banking Board can at its own whim determine who is and who is not a depositor and pay accordingly would be in violation of Sections 6 and 7 of Article 2 of the Bill of Rights of the Constitution of Oklahoma.

III

The word "deposit" has a well defined meaning at law and when the Banking Act of the State of Oklahoma requires that on the taking over of a bank the "depositors" shall be paid in full. The holders of certificates of deposit are just as much depositors as those who carry a checking account. The relation of debtor and creditor exists between the bank and the depositor in each case.

ARGUMENT

I

The proceedings at bar is not an original one in mandamus but is the enforcement of a justiciable right which is to be accorded the injured party where state officers have failed to do their duty. On this branch of the case we do not care to present any further authorities or argument than those already presented by Judge Loomis in his very able brief, to which we refer in conjunction with the matters hereinafter developed.

II

This action is not an action against the state. The defendants cannot seek shelter behind the state for the abuse of their discretion in office..

This is true not only for the reasons assigned by Judge Loomis but on the following constitutional grounds.

a. Section 55 Article 5 of the Constitution of the State of Oklahoma is as follows:

> No money shall ever be paid out of the treasury of this State nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law, nor unless such payments be made within two and one half years after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

The purpose of this constitutional provision is to control the method in which public money or state funds should be disbursed. The word "appropriation" has a definite and certain meaning in law and is generally defined as the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive offices of the government are authorized to use that money and no more, for that object and no other.

State v. Moore, 69 N. W. 373; 50 Neb. page 88.
Citing Ristine v. St. 20 Ind. 328.
Clayton v. Barry, 27 Ark. 129.
Stratton v. Greene, 45 Cal. 149.
State v. LaGrave, 41 Pac. 1075, 23 Neb. 25, 62 Am. St. Rep. 764.
St. v. Wallichs, 12 Neb. 407, 11 N. W. 860.
Proll v. Dun, 22 Pac. 143, 80 Cal. 220.

As applied to the general fund in the treasury of a state, "appropriation" is defined to be an authority from the Legislature, given at the proper time and in legal form to the proper officer, to supply sums of money, out of that which may be in the treasury in a given year, for specific objects or demands against the state.

State v. Lindsley, 3 Wash. St. 125, 27 Pac. 1019.
State v. King, 67 S. W. 812.
Ristine v. State, 20 Ind., 328.
Shatteck v. Kincaid, 49 Pac. 758, 31 Ore. 379.

The matter is discussed fully in the case of Ristine v. State and it seems pertinent to quote from that decision:

> "Appropriation" as used in Const. art. 10, Sec. 3, providing that no money shall be drawn from the state treasury but in pursuance of "ap-

propriations" made by law, means authority from the Treasurer, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in a given year to a specified object or demand against the state. "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the Auditor is authorized to draw his warrant upon an 'appropriation' and the Treasurer is authorized to pay such warrant if he had appropriated money in the treasury. Such an 'appropriation' may be prospective; that is, it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenue; so a direction to pay money out of the treasury upon a given claim or for a given object may, by implication include in the direction an appropriation. But the pledge of the faith of the state that revenues shall be provided in the future and applied to the discharge of given claims against the states, does not authorize the officers of the state, without further legislative direction to apply the general fund in the treasury to the payment of those claims; it is not an appropriation of the money in the general fund." "A promise by the government to pay money is not an appropriation. A duty on the part of the Legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money, in the absence of an appropriation, cannot make an appropriation for future payment," Ristine v. State, 20 Ind. 328, 331.

Appellants counsel in the case at bar contends that the action of the appellee here is one against the state and cannot be maintained for that reason. He reaches his conclusion that it is an action against the

state b ause of an ob ter which appears in the case of Noble State Bank v. Haskell, where the Supreme Court of Oklahoma in that case used the following language:

> "The depositors guarantee fund and funds of a failed bank in the hands of a bank commissioner for the purpose of reimbursing the depositors guarantee fund is as much a fund of the state as the common school fund."

As applied to the facts of the case under consideration, that statement was probably true, but it does not warrant the conclusion which the attorney general seeks to draw from that statement as applied to the facts in Statutes of Oklahoma 1909 contains the law with reference to the school funds in Oklahoma. Section 7916 provides that the state superintendent of public instruction, the Secretary of State and the State Treasurer shall constitute a Board of Commissioners for the management and investment of the school funds. The organization of that Board is also provided for in some detail and their method of handling business prescribed. In Section 7919 it is provided as follows:

> Whenever there accumulates in the hands of the State Treasurer the sum of One Thousand Dollars belonging to the permanent school fund of the state, it shall be his duty to call said Board together and they shall apportion that money to the various counties of the state in proportion to the scholastic population of each; thereupon it shall be the duty of the state treasurer to transmit to the treasurer of the various counties the sum so appropriated to each county and the treasurer of the county shall hold the same as a part of the permanent school fund of this state to be dealt with as hereinafter provided.

Suppose, for example, that this Board of Commissioners instead of apportioning funds coming to its hands, as required by this statute, should apportion those funds as it suited their own pleasure and wishes, and not in accordance with the school population as therein provided, making special disbursements to favored counties and omitting others. Would it be seriously contended by the attorney general that those counties who receive no benefit from this school fund have no remedy against this Board and would be obliged to surrender their claims upon these funds, simply because they were public or state funds and therefore these commissioners were the state officers and could not be sued? Such a contention is not founded in reason nor in justice, and we do not believe will ever be sustained by any court. It has been repeatedly held that administrative or ministerial officers with duties prescribed by law for their performance may be compelled to perform those duties by those who may be directly interested in their performance.

Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623.

Rolston v. Mo. Fund. Com. 120 U. S. 390, 7 Sup. Ct. 599 30 L. Ed. 721.

Graham v. Folsom, 200 U. S. 248, 50 L. Ed 464.

Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350.

Madison v. Smith, 83 Ind. 502.

Huidekoper v. Hadley, 177 U. S. 1.

State Board of Equalization v. People 191 Ill., 528, 61 N. E. 339, 58 L. R. A. 513.

State ex rel. Bourne, 151 Mo. App. 104.

State ex rel. v. Adcock, 206 Mo. 1. c. 556, 105 S. W. 270.

What has been said with reference to the position of the commissioners of the Public School Funds equally applies to the Banking Board. Section 323 of the Revised Statutes of 1909 provides:

> "In event that the Bank commission shall take possession of any bank or trust company which is subject to the provisions of this Act, the depositors of said bank or trust company shall be paid in full."

The payment of depositors under this staute becomes a ministerial duty, a matter in which there is no discretion vested in the Banking Board. True, these funds might be state funds in the same sense that school funds are, but just as in the case of the school funds they are in the hands of a special Board to be used for a limited purpose, that purpose clearly defined by the statute, and more than that, they are collected from a limited source, to-wit, the banks which in themselves receive a special benefit from this guarantee fund. If these funds were state moneys proper, payable out of the state treasury, under Section 55 of Article 5 above quoted necessarily they could only be disbursed on an appropriation made by the Legislature. Any other disbursement would be unlawful and in the face of the constitution. The Legislature could not even delegate this authority to disburse. They could only make appropriation from time to time as in their discretion might seem fit.

The Supreme Court of Oklahoma and this court both held the guarantee fund Act as constitutional and

we concur in that conclusion and being constitutional it inevitably follows that it in no way conflicts with Section 55 of Article 5 above quoted, and therefore the Guarantee Fund is not state money in the sense contended by the attorney general, but money to be disbursed by ministerial officers whose acts are subject to the control of the courts where they fail to perform the duties delegated to them.

b. Section 15 Article 10, of the Constitution of Oklahoma is as follows:

> The credit of the state shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the state; nor shall the state become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association or corporation.

One might believe from the attorney general's brief that he had absorbed the popular idea that prevailed at the time of the enactment of the Guarantee Act. It was then often stated and in a hasty and ill informed sense accepted as true "that the state was behind the state banks. "In other words, that the whole credit and treasury of the state was available for the purpose of taking care of depositors in state institutions. Of course such was not the case. The elementary facts were that the banks, by means of this legislation were compelled to contribute a definite amount to a fund which was to be held by certain officers selected in a manner provided by the statute, and which fund was to be used primarily for

the benefit of depositors in case banks failed, and secondarily for the benefit of the banks themselves who were the contributors to the fund.

This was the sum and substance of this legislation. The law was not in contravention of the above constitutional provision because the treasury of the state of Oklahoma was not available to satisfy depositors. The credit of the state had not been loaned to the banks. The state had simply established sort of a guardianship over these banks such as a Federal government establishes over national Banks. True, this guardianship went a bit further, in that it made an effort to guarantee the safety of depositors, something the Federal government has not undertaken. But those depositors, if paid, were to be paid from resources furnished by contributing banks and not from the state treasury. The state itself did not say to the world "The treasury of this State and its credit is a guarantee to depositors of failed banks that their deposits will be promptly paid." On the contrary all it said was that "We will assess a fund for that purpose." Further than that would have been in contravention of this constitutional provision.

The attorney general, hard pressed for reasons to sustain the action of the State Banking Board, takes the position that the State Banking Board, is the State, and being the State cannot be sued. If the Banking Board in an official capacity is the state, just as is the governor in his official capacity, and the depositor's Guarantee fund is State treasury money just as is the general revenue fund, then the wohle act is unconstitutional. We do not be-

lieve the Act unconstitutional and we cannot give or assent to the interpretation now urged by the attorney general. The money in the fund is not subject to appropriation by the legislature for any purpose it may see fit. On the contrary it is collected from a special source for a limited purpose. The credit of the state is not loaned, simply the credit of this fund. Ipso facto it follows that this is not a suit against the state.

c. Article 2 which is the Bill of Rights of the Constitution of Oklahoma contains the following sections:

> Sec. 6. The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.
>
> Sec. 7. No person shall be deprived of life, liberty, or property, without due process of law.

For the purposes of this case these two sections may as well be discussed together. The first section simply restates the almost universal constitutional guarantee that under our system of laws there is no wrong without a remedy, and yet to deprive the appellee in this this case of its money and deny it judicial relief with the barren statement that this action could not be maintained because against the state would certainly work a wrong and no less certainly find appellee without a remedy. No less certainly would such a course be in the face of Section 7 of the Constitution of Oklahoma in depriving the appellee of its property without due process of law.

The phrase "Due process of law" has been defined so repeatedly both by this court and to it that it is superfluous to suggest more than the various authorities who have considered it. Briefly stated:

> "Due process of law is secured if the laws operate on all alike, and do not subject an individual to an arbitrary exercise of the powers of government. Duncan v. Missouri, 152 U. S. 377, 382, 14 Sup. Ct. 571, 38 L. Ed. 485; Connolly v. Union Sewer Pipe Co., 22 Sup. Ct. 431, 439, 184 U. S. 540, 46 L. Ed. 679; Florida Cent. & P. R. Co. v. Reynolds, 22 Sup. Ct. 176, 179, 183 U. S. 471, 46 L. Ed. 283; Philbrook v. Newman (U. S.) 85 Fed. 139, 143; Seaman v. Clarke, 69 N. Y. Supp. 1002, 1005, 60 App. Div. 416.
>
> Due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Cantini v. Tillman (U. S.) 54 Fed. 969, 975 (citing Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816); Leeper v. Texas, 130 U. S. 462, 468, 11 Sup. Ct. 577, 579, 35 L. Ed. 225; Bank of Columbia v. Okely, 17 U. S. (4 Wheat) 235, 244, 4 L. Ed. 559; Hoover v. McChesney (U. S.) 81 Fed. 472, 481; In re Kemmler, 136 U. S. 436, 448, 10 Sup. Ct. 940, 34 L. Ed. 519; Marchant v. Pennsylvania R. Co., 14 Sup. Ct. 894, 896, 153 U. S. 380, 38 L. Ed. 751; Pinney v. Providence Loan and Investment Co., 82 N. W. 308, 310, 106 Wis. 396, 50 L. R. A. 577, 80 Am. St. Rep. 41; State v. Staten, 46 Tenn. (6 Cold.) 233, 234; State v. Loomis, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789; Zeigler v. South & N. A. R. Co., 58 Ala., 594, 599; Weimer v. Bunbury, 30 Mich. 201, 214; Rockwell v. Nearing 35 N. Y. 302, 306; State v. Hammer, 89 N. W. 1083, 1085, 116 Iowa, 284; State v. State Board of Medical Examiners, 26 N. W. 123, 124, 34 Minn. 387; Eames v. Savage, 77 Me. 212, 221, 52 Am. Rep. 751; Avant v. Flynn, 49 N. W. 15, 18, 2 S. D. 153; McFadden v. Longham, 58 Tex. 579, 5858.

Certainly no better case than the one at bar could be selected to illustrate the reason and importance of this constitutional guarantee. The testimony of the bank commissioner disclosed that the evidence before the Banking Board supporting the claim of the City of Sapulpa and the evidence supporting the claim of appellee were practically the same.

No unprejudiced observer could reach any other conclusion than that the decision of the Banking Board with reference to these two deposits where the evidence was the same and one was paid and one was refused, was controlled by caprice, whim or favoritism. The money in both cases came from the same source. It followed the same course into the Bank's hands. It reached the bank in the same fashion and was held by them in the same way, and yet in one instance the local municipality's deposit was paid by the Banking Board and on the other hand the certificate of the foreign corporation was refused.

Is it to be said that in a case of this kind a party who is deprived of his property has no remedy? Is the proud boast of our constitutional law, both national and state, that "for every wrong there is a remedy" to be laughed at, forgotten and denied with the declaration that "This is the King's justice. The King can do no wrong?" The contention of the appellant in this case amounts to that. It amounts to a denial of appellee's rights in the courts of justice. It would deprive the appellee of his property without due process of law and with absolutely no remedy, affording depositors or failed banks

the same comfort accorded to the subjects of *le grand Monarque*, whose questions were answered by Louis in this language: "The State? Why! I am the State."

III

The word "deposit" has a well defined meaning at law and when the Banking Act of the State of Oklahoma requires that on the taking over of a bank the "depositors" shall be paid in full, the holders of certificates of deposit are just as much depositors as those who carry a checking account. The relation of debtor and creditor exists between the bank and the depositor in each case.

In reaching the conclusion as to whether the holder of a certificate of deposit is protected by the Bank Guaranty Law of Oklahoma, the following statutes of Oklahoma are very important:

Section 4634 Compiled Laws of Oklahoma, 1909 reads:

> "Bills of exchange, promissory notes, bank notes, checks, bonds, certificates of deposit are negotiable instruments."

Sections 2989 and 2990 of said Compiled Laws define deposits as follows:

> "A deposit for keeping is one where the depositary must return the thing deposited. A deposit for exchange is where the depositary must return a thing corresponding to the deposit."

Section 3025 reads:

> "A deposit for exchange transfers to the depositary the title of the deposit and creates between him and the depositor, the relation of debtor and creditor."

Section 280 reads:

> "A Banking corporation organized under the provisions of this Act shall be permitted to receive money on deposit not to exceed ten times the amount of its paid up capital and surplus, deposits of other banks not included, and to pay interest thereon not to exceed, etc."

The Oklahoma laws above cited provide that the title to the article deposited for safe keeping shall at all times remain the property of the depositor, while in deposits for exchange the title vests in the depositary.

In an early day in case of Foley v. Hill 2 H. of L, 28, Lord Cottingham said:

> "Money when paid into bank ceases altogether to be the money of the principal. It is then the money of the bank, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the bank is money known by the principal to be placed there for the purpose of being under the control of the bank; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of banks in some places, or the principal and a small rate of interest, according to the custom of banks in other places."

In the recent case of Carlson vs Kies, decided by the Supreme Court of Washington, August 28, 1913, reported in 134, Pacific 809, the Court defines deposits as follows:

> "A deposit in a bank is either general or special. Where a general deposit is made, it is either credited to the account of the depositor subject to his check or evidenced by a demand or time certificate. The title to the deposit in such cases passes to the bank and it becomes the debtor of the depositor. On the other hand, when a bank accepts a special deposit, it becomes a trustee of the depositor and hold the money subject to the trust."

In Covey vs Cannon 149 S. W. 514, the Supreme Court of Arkansas uses the following lanuguage:

> "If the moneys of these claimants had been placed on deposit in the bank in the usual way, they would have been general deposits, and established relation of debtor and creditor between the bank and the depositors; the bank having the right to mix the money with its other funds and to use it in its own business. If it was placed in the bank for safe keeping and not to be checked out by the depositor, or under an agreement that the bank should act as bailee or agent and deliver the money to some other persons under certain conditions, or apply it to a special purpose, it would have been a special deposit and the bank an agent or bailee with no right to use it and mingle it with its own funds."

This Court in Commercial National Bank vs Armstrong 148 U. S. 50 defines deposits as follows:

> "All deposits made with banks may be divided into two classes, namely, those in which

> the banks becomes bailee of the depositor, the title to the thing deposited remaining in the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money and lends it to the bank. And the latter in consideration of the loan of the money and the right to use it for his own profit agrees to refund the same amount or any part thereof, on demand."

The above statutes of Oklahoma really define general and special deposits—using the term "deposit for exchange" for the former, and "deposit for safe keeping" for the latter, and therefore it must be admitted that a certificate of deposit represents a general deposit and this is the general rule.

The Oklahoma Statute provides: "Depositors shall be paid in full," and while we have not been able to find the identical language construed by an Appellate Court, we do find very similar language construed by such court.

> Wilkes & Co. vs Arthur et al (Supreme Court of S. C.) 74 S. E. 361.
>
> Lamar vs Taylor, (Supreme Court of Georgia), 80 S. E. 1085.
>
> Murphy v. Pacific, (Supreme Court of California), 62 Pac. 1059.

In the South Carolina case supra, the statute under consideration reads:

> "Provided, that stock holders in banks or banking institutions shall be liable to depositors

therein, in a sum equal in amount to their stock."

The question in the case was whether the holders of time certificates were depositors of the bank within the meaning of this statute. In deciding this question, the Court used the following language:

> "The Framers of the Constitution did not contemplate fine spun distinctions between those depositing money in the bank, subject to draft, and those receiving time certificates for their deposits; nor the characteristics of a certificate of deposit and those of a promissory note. It makes no difference how much similarity there may be between a time certificate of deposit and a promissory note, it does not prevent the person receiving the certificate of deposit from still occupying the relation of a depositor. No authority has been cited, and we do not believe any can be found, sustaining the proposition that a party depositing money in a bank in the usual course of business, and accepting a time certificate, is not to be regarded as a depositor."

In construing a like statute the Supreme Court of Georgia in Lamar vs Taylor, supra, said:

> "It is further contended that in arriving at the amount for which suit was directed to be brought against each stock holder, the parties have included the claims of holders of certificates of deposit as well as those of ordinary deposits subject to check. The argument was that certificates of deposit were in the nature of promissory notes and the holders of them were really creditors of the bank rather than depositors within the meaning of the Charter. The language of the charter refers in general terms to depositors. It does not confine the liability of stock holders to the pay-

ment of depositors whose claims are evidenced by extries in pass books, of exclude those whose claims might be evidenced by certificate. Certificates of deposit are not always uniform in their provisions, and the special terms contained in them may to some extent vary their effect. The contention with which we are dealing does not depend upon the terms of any particular form of certificate, but on the theory that certificate holders generally are not depositors within the meaning of the charter. It is true that holders of certificates of deposit are creditors of a bank and that certificates of a certain form have been declared to be in effect promissory notes. But a general deposit also creates the relation of debtor and creditor between the bank and the depositor. It is not contemplated that the actual money deposited will be held by the bank, but that it will be used and other money will be paid when called for by the check of the depositor. Thus whether a general deposit be evidenced by an entry in a pass book, or by a deposit slip, or by a certificate the legal relation between the parties is that of debtor and creditor. The expression "certificate of deposit" in itself imports that it is based upon a deposit and the issuing of such a certificate does not exclude the holder from falling within the general descriptive word "depositors" for whose benefit the additional liability was created by the charter."

The Presiding Judge did not err in treating the holders of certificates of deposit as depositors within the meaning of the charter.

In Murphy vs Pacific Bank, supra, the contention was that a certificate of deposit is a promissory note, and the Court said:

"A certificate of deposit issued by a bank is

not known as a promissory note, though it is negotiable, is for a certain sum, payable to a specific person, or order, and no time of payment being specified is payable immediately. The code however declares there are six classes of negotiable instruments, namely, bills of exchange; promissory notes—certificates of deposit, thus distinguishing between them by placing them in separate classes. It is sufficient for the purposes of this case to say that in the business world, as well as in legislation and decisions of Courts, certificates of deposit are understood to represent money left with a bank or banker and which is to be retained until the depositor demands it; the certificate being in the nature of a receipt executed by the bank therefor, in which is usually recited, as in the certificate under consideration, the fact that money has been deposited with the bank by the person to whom the certificate is issued; and we therefore conclude that in the Act of 1862 under which the Pacific Bank was organized and existes that the term "depositors" was intended to include such depositors as well as those made upon open account and subject to check and that certificates do not imply a loan in the ordinary sense nor create the ordinary relation of debtor and creditor evidenced by promissory note."

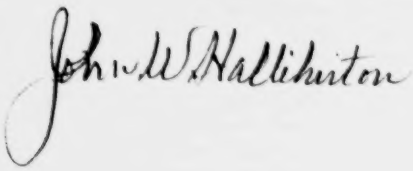
Section 4634 Supra shows that the Legislature of Oklahoma in enacting its laws did not consider a promissory note and a bank certificate as one and the same thing as it has expressly separated them into classes by this Section.

The language found in Section 280 Supra of the laws of Oklahoma is very important as it clearly shows that interest bearing deposits are covered by the Bank Guaranty Law. Our contention is that the statute au-

thorizing the banks to pay interest on deposits refers to all deposits whether subject to check or represented by time certificates. It is the contention of the Attorney General that deposits subject to check, but bearing interest are covered by the Guaranty Law but deposits not subject to check and represented by time certificates are not protected by the law. We contend there is no authority or reason for such a technical construction of the Act.

We submit that under the law and the facts, the finding of the trial judge should be affirmed.

Howard Gray,
Allen McReynolds,
Counsel for Appellee and
others similarly situated.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

J. D. LANKFORD, JOHN J. GERLACH, W. F. BARBER and A. D. KENNEDY, Composing the State Banking Board of the State of Oklahoma,

Appellants,

v.

PLATTE IRON WORKS COMPANY, a Corporation,

Appellee.

No. 381

APPEAL FROM UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF OKLAHOMA.

BRIEF.

STATEMENT, POINTS AND AUTHORITIES, AND ARGUMENT ON BEHALF OF APPELLEE.

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IN THE

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BRIEF.

STATEMENT, POINTS AND AUTHORITIES, AND ARGUMENT ON BEHALF OF APPELLEE.

STATEMENT OF FACTS.

Defendants John J. Gerlach, A. D. Kennedy and W. F. Barber constitute the state banking board of Oklahoma. Defendant J. D. Lankford is state bank commissioner of said state. The Farmers & Merchants Bank, of Sapulpa, Oklahoma was a state bank incor-

porated under the laws of Oklahoma, and located at Sapulpa, Oklahoma. On the 10th day of September, 1912, J. D. Lankford, as state bank commissioner took charge of said bank, together with all of its assets and property and proceeded to wind up its affairs in accordance with the state banking law of Oklahoma.

C. J. Wurtzberger was during 1912 and hitherto has been the city treasurer of Sapulpa, Oklahoma, and kept a deposit account as city treasurer with the Farmers & Merchants Bank.

The Southwestern Engineering Company had a contract with the city of Sapulpa to construct a water works system for said city. E. J. Merkle & Company, of Kansas City, was a sub-contractor under the Southwestern Engineering Company, for a part of said work.

On June 8th, 1912 a settlement was made between said construction company and the city of Sapulpa. A city warrant, in the usual form was issued to E. J. Merkle & Company for the amount due that company, to-wit: $10,429.16, drawn on the city treasurer of said city. Said warrant was presented to said city treasurer for payment and said city treasurer, in payment for said warrant, issued his check payable to the order of E. J. Merkle & Company, for said amount, on the Farmers & Merchants Bank, of Sapulpa, Oklahoma. This check was presented to the said Farmers & Merchants Bank, for payment on said date, and E. J. Merkle & Company accepted in payment of said check, the sum of $2,529.16 in cash and deposited the remaining $7,800.00 in said bank, and received as evidence of such deposit, the two certificates of deposit herein sued on.

The check drawn by said city treasurer on said bank after having been paid by said bank was returned to the said city treasurer, properly endorsed and charged to his account in said bank, as city treasurer of said city.

Warrants and checks were drawn against the water works fund, a special fund created by the sale of an issue of bonds and ap-

plicable solely to the payment for the construction of the water works system and plant in said city of Sapulpa.

The bank book of said city treasurer with said bank showing said deposits and checks, was introduced in evidence, was regular on its face, kept in the usual course of business with said bank, and showed that on June 8th, 1912 when said check was issued, the city treasurer had on deposit in said bank, $28,053.44.

The check was returned to the city treasurer by said bank in the usual course of business and the paid check was charged against the account of said city treasurer and the bank received credit in said account.

When the said bank failed on September 10th, 1912, said city treasurer had on deposit in said bank, in said account the sum of $36,455.00 and some cents.

After the failure of the bank, the state banking board settled with said city treasurer for the amount of his deposit as shown by said bank book, and accepted his said bank book as correct.

The said bank book of said city treasurer, said warrant, said check, the records of the commissioners of the city of Sapulpa, authorizing their issue, and the testimony of said city treasurer, and the city clerk of said city of Sapulpa, were all offered in evidence, before the state banking board, when claim was presented for the payment of said deposit. (See pages 19 and 20 of the printed record.)

The state bank commissioner admitted that the bank book of said city treasurer was regular on its face, appeared to have been kept in the usual course of business, by the duly authorized officers of the bank; that it purported to contain all the items of deposit and checks with the bank, and that he did not question it, that the city treasurer and city clerk of the city of Sapulpa were men of integrity and he did not question their integrity or their testimony; that the bank book of the city treasurer would show whatever the

original books of the bank would show, and is a correct copy of same.

When pressed for his reason for refusing payment of the certificates of deposit sued on, his reason is contained in the following question and answer:

> "Q. Then the only reason you can give why this deposit is not a legal deposit, is because you have not got the bank books to prove it
>
> A. Yes, that is true."
>
> (See pages 26 and 27 of printed record).

POINTS AND AUTHORITIES.

POINT ONE.

(a) A proceeding to obtain a judgment against officials in a representative capacity, payable out of a specific fund in their charge and control, is a proceeding to obtain a judgment for money not otherwise secured, within the meaning of the Federal Judiciary Act and confers jurisdiction upon the United States Court. And this is true although it may be necessary to resort to mandamus to enforce collection of the judgment when obtained.

Jordan v. *Cass Co.*, 3 Dill., 185;
Cass Co. v. *Johnston*, 95 U. S. 360; 24 L. Ed. 416;
Davenport v. *Dodge Co.*, 105 U. S. 237, 26 L. Ed., 1018.

(b) This is not an original proceeding for mandamus, but is an action to recover a judgment against the members of the state banking board in their representative capacity, collectible out of the depositors' guaranty fund, in their possession and control. And if the judgment is not paid, then as ancillary to the judgment a writ of mandamus is asked to compel the issuance of depositors' guaranty fund warrants, and to compel the levy and collection of such assessments against the state banks as is provided by law for the payment of the judgment.

Jordan v. *Cass.*, 3 Dill., 185, cited and approved *in toto* in *Cass Co.* v. *Johnston*, 95 U. S., 360, 24 L. Ed., 416;
Cass Co. v. *Johnston*, 95 U. S. 360, 24 L. Ed. 416;
Also approved in *Davenport* v. *Dodge Co.*, 105 U. S., 237, 26 L. Ed. 1018;

Aylesworth v. *Gratiott,* 43 Fed. 350, affirmed without opinion;
159 U. S. 40 L .Ed. 146;
Fuller v. *Aylesworth,* 75 Fed., 694;
Heidekoper v. *Hadley,* 177 Fed., 1 .

POINT TWO.

This is not a suit against the state of Oklahoma. An action against a state officer to compel him to perform duties prescribed by law, is not an action against the state. An officer who refuses to obey the law does not stand for the state, within the meaning of the Federal Constitution.

A sovereign state must be resumed to be willing that its laws shall be obeyed. Through its laws it speaks to its servants, and commands them to do something. Those servants by their acts of disobedience do not stand for or represent that state. This suit therefore, instead of being against the state, is against its servants to compel the performance of duties, which by their acceptance of the office, they obligated themselves to perform.

Heidekoper v. *Hadley,* 177 Fed., 1;
Lankford v. *Oklahoma Eng. & Ptg. Co.,* 130 Pac., 278;
State v. *Cockrell,* 27 Okla., 630, 112 Pac., 1000.
Ralston v. *Mo. Fund Commissioners,* 120 U. S., 390, 30 L. Ed., 721;
Graham v. *Folsom,* 200 U. S., 248, 50 L. Ed., 464;
Taylor v. *Louisville & N. R. Co.,* 88 Fed., 350, 31 C. C. A., 537;
Smith v. *Ames,* 169 U. S., 518, 42 L. Ed., 819;
Ex Parte Young, 209 U. S., 123, 52 L. Ed., 714.

POINT THREE.

The fact that the complainant may have a remedy in an original proceeding in mandamus in the state court for the cause of action alleged, will not deprive the complainant of the right to sue in equity in the federal court.

Smith v. *Ames,* 169 U. S., 518, 42 L. Ed., 819.

POINT FOUR.

The depositors' guaranty fund of the State of Oklahoma is not a part of the general state funds and is not under the control of, and cannot be used by the executive or legislative branches of the state government for general state purposes, or for any purpose whatever.

The fund is in the possession and control of the state Banking Board, and can be used solely for the purpose of paying depositors of failed banks, and a proceeding to recover a judgment for the depositor of a failed bank is not a proceeding against the state to enforce any liability of the state.

Danby v. *State Treasurer,* 39 Vt., 92;
Session Laws of Oklahoma, 1911, Chap. 31, Sec. 6;
Session Laws of Oklahoma, 1913, Chap. 22, Sec. 6.

POINT FIVE.

Depositors in failed banks have a justiciable right to enforce payment out of the depositors' guaranty fund.

Danby v. *State Treasurer,* 39 Vt., 92.

POINT SIX.

(a) This is not a suit on a certificate of deposit, as a negotiable instrument, but is a suit for money actually deposited. The fact that a certificate of deposit was accepted as evidence of the deposit, will not deprive the depositor of the right to be paid out of the depositors' guaranty fund.

(b) The holder of a time certificate of deposit is a *"depositor"* within the meaning of the State Bank Guaranty Law of Oklahoma.

Tiffany on Banks & Bankings, 75;
Williams v. *Rogers*, 77 Ky., 776;
Wilkes & Co. v. *Arthur*, (S. C.) 74 S. E., 361;
Lamar v. *Taylor*, (Ga.) 80 S. E., 1085.

ARGUMENT UNDER POINT ONE.

District courts of the United States have no power to issue writs of mandamus in an original action brought for the purpose of securing relief by the writ, as that proceeding is defined in the decisions of this court. But district courts of the United States have jurisdiction in a proceeding to establish a justiciable right where such right exists and to obtain a judgment adjudicating that right, although a money judgment is not sought against the defendants personally, but a judgment is sought against the defendants in their representative capacity, and payable out of a specific fund in their possession and control, and although such judgment could only be enforced by the issuance of a writ of mandamus.

A brief reference to the cases cited by the appellants in their brief on the question will illustrate the meaning and application of the rule.

In the case of *State ex rel. Knapp* v. *Lake Shore & Mich. Ry. Co.*, 197 U. S., 540;49 L. Ed., 870, it is held that mandamus to compel the performance of specific acts, against the interstate commerce commissioners, was not mandatory. No other relief was asked than the issuance of the writ to compel the performance of the acts which were brought to compel the commissioners to perform.

The case of *Jabine* v. *Oats*, 115 Fed. 861, cited by the defendants, simply held that the appeal would not lie, from a judgment awarded on a writ of mandamus, because that is a proceeding at law, and not appealable.

Large v. *Consolidated National Bank*, 137 Fed. 168 was an

application to the Federal Court by a shareholder of the National Banking Association, for a writ of mandamus to compel the association to permit an inspection of a list of its stockholders. *Held* it could not be maintained.

The case of *Pensacola* v. *Lehman,* 57 Fed. 324 was a proceeding to enforce conveyance of certain real property by specific performance. It was held, incidentally that mandamus would not be a complete remedy at law, and therefore would not oust the Federal Court of equity jurisdiction by furnishing an adequate remedy at law.

The case of *Denton* v. *Baker,* 79 Fed. 189, held that the holder of a judgment against an insolvent bank recovered on a claim rejected by the receiver, has an adequate relief by an action at law against the receiver. This case does not appear to be in point.

Burnham v. *Field* 157 Fed. 246, was a proceeding in mandamus to require the defendant who was the duly elected and qualified clerk of Multnomah County, Oregon, to keep open his office for the receipt, filing and recording of deeds, etc.

But no adjudication of any justiciable right that could be the foundation of a money judgment, general or special, was involved.

The case of *Gates* v. *Northwestern National Builders Association* 55 Fed., 209, was a suit for mandamus to compel the defendant corporation to hold a stockholders' meeting for the election of directors. In that case no justiciable right that could be the basis of any money judgment, general or special, was involved.

The case of *State of Indiana* v. *Lake Erie Ry. Co.,* 55 Fed., 3, was an application by a city for a mandamus to compel the railroad company to reconstruct an over-head crossing. No justiciable right that could be the foundation of any money judgment, general or special, was involved in this action.

In re Forsyth, 78 Fed., 301, was an application for a writ of mandamus to compel the clerk of the court to deliver to the receiver of the Oregon & Pacific Ry. Co. the check drawn on a fund in the

registry of the court. Likewise in this case no justiciable right which could be the foundation of a money judgment, either general or special, was involved.

The case of *Covington, etc., Bridge Co.* v. *Hager*, 203 U. S., 109; 51 L. Ed., 112 was a proceeding in mandamus to compel the return of a franchise tax collected under authority of a state statute. It was held the circuit court has no power to issue the writ of mandamus in an original proceeding brought for the purpose of securing relief by the writ, but have only power to issue such writ in aid of their jurisdiction in cases already pending.

It will be observed that in all of these cases the relief sought was not adjudication of any justiciable right of the plaintiff by a judgment and decree of the court showing those rights and in case such judgment or decree should not be complied with or performed by the defendant, that a writ of mandamus issue to enforce such judgment and decree, but the sole relief sought was the issuance of the writ, by which alone the federal court became possessed of jurisdiction.

As was said by Mr. Justice Day in 203 U. S., *supra*, the power to issue such writ is only in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means or other proceedings. In this case the jurisdiction of this court has not been acquired by the issuance of any original writ of mandamus. This is not a proceeding for the purpose of obtaining the issuance of an original writ of mandamus. This is a suit against the state banking board of Oklahoma, alleging facts entitling the plaintiff to a judgment and decree of this court adjudging and decreeing that plaintiff was a depositor in the Farmers & Merchants Bank, of Sapulpa, Oklahoma, and adjudging that as such depositor he is entitled to be paid his deposit out of the state bank guaranty fund in possession and control of the defendants, and adjudging that the defendants pay such claim out of said fund.

In other words, a judgment and decree of the court is sought

against the defendants in their representative capacity, for the amount of the complainant's deposit, and if the defendants fail or refuse to pay the judgment out of the funds available, or if there are no funds available applicable to the payment of the judgment, then ancillary to and in aid of the judgment of the court theretofore rendered, that the court issue its writ of mandamus to enforce the payment of the judgment by compelling the issuance of depositors' guaranty fund warrants, and to compel the levy and collection of such assessments as the law authorizes to be levied and collected for the purpose of paying the judgment. But the issuance of the writ of mandamus is subsequent to the rendition of the judgment and ancillary to, and in aid of the collection of the judgment. The issuance of the writ of mandamus is not sought or asked as a part of the original relief sought and is not sought, in any event until after the rendition of the judgment.

The foundation of the jurisdiction of the federal court is the assertion of a justiciable right to a judgment and decree against the defendants for the payment of money, either personally or against them in their representative capacity, out of funds for which they are accountable.

When a justiciable right is asserted which may become the foundation of a judgment and decree independent of the issuance of an original writ of mandamus, jurisdiction vests in the United States Court, even though the issuance of a writ of mandamus is necessary to carry out the execution of the judgment.

A leading case defining the jurisdiction of the United States Court to take jurisdiction to enforce justiciable rights, although mandamus would be the proper proceeding in a state court, where parties by reason of their citizenship are entitled to sue in the federal court, is found in the case of *Jordan* v. *Cass County*, 3 Dillon, 185, which holds:

"As townships were not incorporated bodies, the Act of March 23, 1868 above mentioned when the proposal has been adopted by

the voters of the township authorizing the county court to issue bonds *in the name of the county,* on behalf of the township voting the aid," *Held,* (construing the laws of Missouri), (1 that the owners of bonds thus issued by a county (or a township) had no remedy by action against the township or taxable inhabitants therein; (2) that the remedy of the owner of the bonds was by mandamus to the county court to compel it to levy and collect the special taxes which the act provided as the means to pay the bonds and interest thereon; (3) that such an owner could *sue the county* in whose name the bonds were issued, in the federal court and recover judgment thereon, but such judgment could not be enforced against the county or its property or the taxpayers of the county at large, but only by mandamus to the county court to compel the levy and collection of the special tax according to the statute in such cases provided.

The opinion was rendered by that eminent jurist, Judge Dillon. The precise question presented in the case at bar was in a very learned opinion fully considered and decided that wherever the plaintiff who by reason of his citizenship is entitled to adjudicate his rights in the federal court, has a justiciable right, which may be the foundation of a decree, although such judgment or decree will not be a general decree or judgment enforceable against the defendant except by the subsequent issuance of a writ of mandamus the federal court will take jurisdiction and adjudicate the rights of the parties, and subsequently and ancillary thereto, if necessary, issue its mandamus to enforce the decree and judgment, and the fact that the writ of mandamus is prayed for in the petition on trial, and the judgment and decree awards a writ of mandamus will not characterize the proceeding as an original mandamus proceeding and therefore not cognizable by the federal court.

In that case the county court had issued bonds for and on behalf of the township. The township was not incorporated and could not be sued. The county was in no way liable for the obliga-

tion. The only duty imposed on the county was to levy and collect the special taxes to pay the bonds, and the court held such proceeding, if brought in the state court was mandamus, but that the federal court would take jurisdiction and adjudicate the rights of the plaintiff against the county, and subsequently thereto issue its writ of mandamus to enforce the decree, if necessary.

In the course of the opinion Judge Dillon said:

> "The legislature has provided the mode of raising the means for the making payment of the bonds, which is by levying and collecting a *special tax* for that purpose, to be 'levied on all of the real estate lying within the township,' and it has especially enjoined on the county court the duty of levying and causing such special tax to be collected, and undoubtedly this is such a duty, as, supposing the bonds to be valid, may be enforced by mandamus. It is to our mind clear that the bond holder, if he chose to resort to the state tribunals, might without first obtaining a judgment against the county or township file information for a writ of mandamus to be directed to the county court to compel it to levy and cause to be collected the special taxes from which alone can come the funds that the law has provided for the payment of the bonds. Dillon on Municipal Corporations, Sec. 685, etc.
>
> But this court has no original jurisdiction in mandamus; it cannot acquire jurisdiction by an original proceeding in mandamus. *But where jurisdiction otherwise exists it may issue the writ when necessary to the exercise of its jurisdiction agreeably to the principles and usuages of law. Bath Co. v. Amey*, 14 Wallace, 244, *U. S. v. U. P. R. R. Co.*, 2 Dillon 527. Therefore the holder of these bonds cannot have any standing in the Federal Court, *unless he is entitled to recover a judgment thereon and to enforce such judgment, if necessary by mandamus.* This results not from any intrinsic difference in this respect between the State and Federal courts, but from the peculiar language in which the jurisdiction of the Circuit Court of the United States is conferrd by the judiciary act.
>
> We are thus brought to the question of whether the holders of the bonds issued pursuant to the act of March 23, 1868 *may recover judgment thereon against the county in whose name they are issued, to be enforced if necessary, not by an execution against the county, but by mandamus against the county court to compel it to levy on the property in the town-*

ship, the special tax which the law has enjoined as a duty upon it.

After some hesitation we have reached the conclusion that such an action will lie and that this view will best carry out the design of the legislature in the enactment in question."

After discussing the particular act in question at some length and holding in effect that the township was not liable to be sued for the payment of the bonds, and that the county could not be held liable for the payment of the bonds, it simply being the duty of the county court to levy and collect the special tax to pay the bonds, Judge Dillon said:

"The constitution will not be infringed upon by allowing the county to be sued, but the judgment we render is not the one that is to be satisfied out of the property of the county, if it owned any property, or can own any which is subject to taxation, or by a tax upon the people and property of the county at large. It seems to us that the provision that the bonds shall be issued in the name of the county, implies a liability on the county to be sued, so far as is necessary to give effect to the rights of the holders of the bonds, consistent with the provisions of the constitution. *The right of the non-resident citizens to resort to the courts of the United States is one which is given by the constitution and laws, and is a right which the citizen would be apt to regard as especially desirable, where, if he is compelled to resort to the state courts, it must be to a county whose citizens in whole or in part are his real adversaries and who may constitute the jury to decide the case. This right so valuable to the plaintiff, but which deprives the defendant of no just advantage, since the Federal Courts, are by their constitution to stand wholly indifferent between all parties, ought not to be considered as unavailable to a non-resident citizen, unless a fair construction of the enactment applicable to the question so requires.*

It is in our judgment practicable consistently with established legal principles to protect the constitutional rights of the counties, and at the same time to recognize the constitutional rights of the non-resident citizen, to come with these securities into court and have his rights in respect to them determined.

This is to be effected by the nature of the judgmnt we render, which is not a personal judgment against the county,

but only a judgment judicially establishing the plaintiff's debt, if no defense is successfully made.

If the debt shall be thus established we must suppose the proper county court will levy and collect from the property within the township, the necessary tax to pay the debt.

But if it should not, this court has the power, and in that event it would become its duty by mandamus to cause such tax to be levied and collected."

This view, in effect makes the county the trustee for the township which is one of the sub-divisions of the county, and a necessary party to the action, but not a party personally liable for the debt which the plaintiff may establish.

Later on in the opinion, Judge Dillon says:

"This, it is to be remembered is a law action and the judgment to be rendered which so far as the anomalous legislation under review will admit of it, is consistent with the restricted power and somewhat rigid rule of the common law courts.

But the common law adjudications show that the judgment may be molded so as to conform to the rights of the parties under the law, and by analogy support the view we take" (citing many authorities).

This opinion of Judge Dillon was approved *in toto* by this court in *Cass County* v. *Johnston,* 95 U. S., 360, 24 L. Ed., 416, l. c. 418 where this court said:

"It is finally objected that, as the bonds are in fact the bonds of the township, no action can be maintained upon them against the county. Without undertaking to decide what would be the appropriate form of proceeding to enforce the obligation in the state court, it is sufficient to say that in the courts of the United States, we are entirely satisfied with the conclusion reached by the court below, and that a judgment may be rendered against the county to be enforced, if necessary by mandamus against the county court or the judges thereof, to compel the levy and collecting of a tax in accordance with the provisions of the law under which the bonds were issued. The rea-

soning of the learned Circuit Judge, in *Jordan* v. *Cass Co.*, 3 Dill., 185, is to our minds perfectly conclusive upon this subject and we content ourselves with a simple reference to that case as authority upon this point.

The judgment of the Circuit Court is affirmed."

Another leading case illustrating the application of the rule is *Aylesworth* v. *Gratiot County*, 43 Fed. 350.

In that case the court held:

"An action lies in the Federal Court upon drain orders drawn by a county drain commissioner, upon a county treasurer, though the orders themselves create no debt against the county and the sole duty of the county officers is to assess and collect the cost of constructing the drain from the owners of the property benefited by it. In such case the judgment is special, and is enforceable only by mandamus to compel the collection of the tax."

The opinion in this case was rendered by Judge Brown, later Justice Brown, of the Supreme Court of the United States. The opinion is a very able and learned one, and states the law so clearly that we quote from it extensively.

On pages 351 to 353 the court says:

"While this is nominally an action to recover the amount of these orders from the county, the real object is to procure the issue of a writ of mandamus for the collection of this tax from the property benefited by the drain. Several defenses are interposed, which I will proceed to consider in their order.

(1) That the orders created no obligation against the county. If by this it is intended merely to urge that the orders created no debt against the county which as a municipal corporation, it is bound to pay, the position taken is correct. It is well settled that, where public improvements are by law to be made at the expense of adjoining property, no charge against the corporation is created, and its only duty is to take necessary legal steps to collect the assessment, and to pay it to the parties justly entitled thereto. Thus it was held in the case of *Lave* v. *Trustee*, 4 Denio, 520, in an action upon an order given by the president of a village upon the treasurer to pay the con-

tractor a certain sum out of a particular fund, that the corporation was the agent or instrument of the land-holder having an interest in the matter, to ascertain how much each one ought to pay and another to receive, and to collect the money from those who were benefited, and see that it was properly applied to the particular object, and that this was the extent of its duty. It was held that the plaintiff could not recover generally against the corporation as for a debt, and it was intimated that the plaintiff had a remedy by mandamus, or by an action on the case against the trustee for neglect of duty. This is also an intimation of the Supreme Court in the case of *Ogden* v. *County of Daviess*, 102 U. S., 634. And I believe that the authorities are uniform to the effect that no action will lie against that county upon these obligations as for a debt chargeable against it. *Goodrich* v. *Detroit*, 12 Mich. 279; *Bank* v. *Lansing*, 25 Mich., 207. The proper remedy in this class of cases in the state court is by writ of mandamus to compel the assessment and collection of the tax by the officers charged with that duty, and the payment of the same to the party entitled thereto.

As a petition for a writ of mandamus in the federal court will not be entertained as an original proceeding, it was at one time supposed that no action or any kind would lie against a municipality. In the case of *Boro* v. *Phillips Co.*, 4 Dill. 216 it was held that the failure or refusal of the county to discharge its duty in such cases did not make it liable to a general judgment for the obligation of the particular district, and could not be made the foundation of an action against the county for a money judgment. This may be entirely true, and yet it does not follow that there is no remedy in the federal court where the plaintiff is entitled to sue therein by reason of his citizenship. The general rule is believed to be without exception that, where the plaintiff is otherwise entitled to relief in this court he will not be debarred therefrom by reason of the fact that his remedy in the state court, upon the same cause of action, would be of a character which we are not entitled to administer here. Hence it was held by Judge Dillon in the case of *Jordan* v. *Cass Co.*, 3 Dill., 185, that the holder of county bonds issued by a county court on behalf of a township voting aid to a railway might sue the county in the federal court and recover judgment thereon although such judgment could not be enforced against the county or its property, or the tax-payers of the county at large but only by mandamus to the county court to compel the levy and collection of the special tax, according to the statute, this is believed to be the earliest case upon the subject and the opinion is a very interesting and instructive

one. The case was approved in *County of Cass* v. *Johnson*, 95 U. S. 360, and was applied in the case of *Davenport* v. *County of Dodge*, 105 U. S. 237, to bonds issued to county commissioners on behalf of a precinct which had no corporate existence and could not contract or be contracted with. The court considered the bonds in this case as special bonds, which the county commissioners were to issue for the precinct, and that they were in legal effect the special bonds of the county, payable out of a special fund to be raised in a special way. Similar ruling was made in the case of *Blair* v. *Cuming Co.*, 111 U. S., 363, 4 Sup. Ct. Rep., 449. This case differs from the others in the fact that the bonds contained no promise by the county to pay, but a promise by the precinct, which had no corporate existence. Notwithstanding this, the county was held liable to the performance of the obligation."

And again on pages 354 and 355 the court says:

"It is evident that under this act most ample powers are conferred on the board of supervisors with regard to the assessment and collection of these taxes, and in case of any dereliction of duties on their part there ought to be a remedy against the corporation, of which they are the authorized expression and agent. As before observed, the proper remedy in the state court is by mandamus. As this court is incompetent in the first instance, to afford this relief, we think an action may be brought against the county, and the collection of the judgment enforced by the same process of mandamus that would be resorted to if the proceedings had been instituted in the state court."

We have quoted thus extensively from this case because it cites and follows the leading case of *Jordan* v. *Cass*, 3 Dillon, *supra*, and this case was affirmed by the United States Supreme Court without rendering any opinion in 159 U. S., 59, L. Ed., Book 40, page 146.

It will be observed that in this case the court states:

"The proper remedy in the state court is by mandamus. As this court is incompetent in the first instance, to afford this relief, we think an action may be brought against the county, and the collection of the judgment enforced, by the same process of mandamus that would be resorted to if the proceeding had been instituted in the state court."

It will be observed that in this case the court held and it was admitted that the drain orders sued on created no debt against the county and that no money judgment could be rendered against the county, other than an adjudication of the rights of the plaintiff, as a basis for later proceedings by mandamus to compel the county board to assess and collect the special tax, the sole duty of the county officers being to assess and collect special taxes provided by law.

In other words, there is simply the assertion of the legal right of the plaintiffs who were the owners of the drain orders to have the county assess and collect the special taxes provided by law, and to have their rights adjudicated, and the federal court took jurisdiction and adjudicated their rights and rendered its decree against the county and as an ancillary proceeding, to and in aid of such decree, issued its writ of mandamus to enforce it, which is exactly the proceeding we now seek in the case at bar. The proceeding now before the court follows literally the doctrine laid down in the case of *Jordan* v. *Cass*, 3 Dillon, *supra*.

In the case of *Fuller* v. *Aylesworth*, 75 Fed., 694, the same doctrine is stated with great clearness in a very learned opinion rendered by Judge Taft. In that case will be found a very learned and clear definition, defining what is "a judgment for the recovery of money."

The court there held:

> "That a judgment rendered against a county for the amount of certain drain warrants, with provision for mandamus to compel the levy of assessments according to law, upon the lands benefited by the drains, was one 'for the recovery of money not otherwise secured.'
>
> A 'judgment for the recovery of money,' is one which adjudges a defendant either as an individual or in a representative capacity, absolutely liable to pay a sum certain to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs; and the fact that the judgment does not involve the personal liability of the defendant is immaterial."

This case grew out of the case of *Aylesworth* v. *Gratiot County*, 43 Fed., 350, *supra*, and was an action on the appeal bond given in that case.

It will be found interesting to read the judgment rendered by Justice Brown in *Aylesworth* v. *Gratiot Co., supra*, which will be found quoted in full in the 75 Fed., at page 697, in which a money judgment adjudicating the rights of plaintiff to recover and be paid out of the funds available and the duty of the court to levy and assess the tax required by law to be levied and assessed, and on failure to perform such duties, the writ of mandamus shall issue to the board of supervisors of said county directing that the amount of said damages, costs and interest be levied and assessed as required by law, which is the precise form of the decree n the case at bar.

Judge Taft in his opinion (pages 698 to 701) says:

> "The main controversy in the case is whether the judgment against Gratiot county which was superseded was 'a judgment for the recovery of money not otherwise secured.' If it was, then clearly the bond taken was in proper form, and rendered the sureties liable for the whole amount of the judgment in the circuit court. It is strenuously urged by counsel for the plaintiffs in error that the judgment is in reality not for money, but only for an order of mandamus on county officers to make a levy upon lands in certain specified township; that the county is in no sense responsible as a debtor for the amount established to be due, and that the only amount recoverable under the statute, and embraced by a lawful supersedeas bond, is for costs and damages for delay, which are not shown. It is settled by a long line of decisions of the supreme court that the circuit courts of the United States have no jurisdiction to consider and decide a suit for mandamus to compel the discharge of statutory or other duty except for the purpose of enforcing their judgments previously rendered. The result was reached by a construction of the eleventh and fourteenth sections of the judiciary Act, which now appears in the Revised Statutes as Section 629 and 716. The former confers on circuit courts original jurisdiction 'of all suits of a civil nature at common law,' and the latter provides 'that such courts shall have power to issue all writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.' The

supreme court was of opinion that while, if the eleventh section of the judiciary Act was not accompanied by the fourteenth, a mandamus proceeding might be properly regarded as a suit of a civil nature at common law, the presence of Section 14 in the same Act, providing for the issuance of such a writ as an ancillary writ, indicated that the words of Section 11 were to be given a narrower construction, and one which would not include suits in mandamus. Hence the uniform ruling of the supreme court has been that, even in states where by statute it is specifically provided that a mandamus may be issued against public officers to levy a tax to pay a public debt without other proceeding than an application for mandamus and a hearing thereon, such a statute does not apply to a circuit court of the United States, and that in those courts a judgment against a corporation liable for the debt must be rendered before a mandamus will issue. *Bath Co.* v. *Amy*, 13 Wall., 244; *Graham* v. *Norton*, 15 Wall., 427; *County of Greene* v. *Daniel*, 102 U. S., 187-195; *Davenport* v. *County of Dodge*, 105 U. S., 237; *Rosenbaum* v. *Bauer*, 120 U. S., 450; 7 Sup. Co. Rep., 633. It follows that the writ of mandamus in the circuit court is never an independent suit, as it is in many states and in England, but it is only 'a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract.' (*Riggs* v. *Johnson Co.*, 6 Wall., 166, 198.) In *County of Greene* v. *Daniel*, 102 U. S., 187, 195, it is said to be in the nature of an execution to carry the judgment into effect. In *Rosenbaum* v. *Bauer*, 120 U. S., 450, 7 Sup. Ct. Rep., 635, the court said: 'The issue of the mandamus is an award of execution on the judgment, and is a proceeding necessary to complete the jurisdiction exercised by rendering the judgment.' The result is that in the circuit courts of the United States there must be a judgment for the recovery of money before there can be a mandamus to levy a tax to pay it, and that the mandamus is only a form of executing the judgment. It was in obedience to this requirement that the plaintiff sought and obtained his judgment on the drain warrants. It was a judgment against the county for the recovery of money, and the recovery of the money was 'not otherwise secured,' than by the judgment itself. There was no property in the custody of the court, and none under any lien which this proceeding was brought to enforce and forclose.

For these reasons we think the judgment was in the class referred to in Rule 29 of the supreme court, in which the bond

required to make the writ of error a supersedeas must be conditioned upon the payment of the amount of the judgment.

But it is vigorously pressed upon us that the debt for which the judgment was rendered was not the debt of the county, but that of the owners of certain lands in three townships, which were benefited by two ditches. It is true the county did not obligate itself in terms to pay these warrants, though they were drawn and approved by its officers; but the effect of Mr. Justice Brown's opinion and judgment in the original suit (43 Fed., 350) was, that by law it was the duty of the county to collect the tax upon these lands, and to pay the warrants out of the fund thus created; that, as there was no other corporate or *quasi* corporate body to represent the persons whose lands were benefited, the county was evidently intended by the law to be their representative, and, therefore, that the county was the proper defendant, as trustee and representative of the real debtors, against which a judgment might be entered as the essential foundation for a mandamus proceeding to enforce the collection of the proper taxes. Mr. Justice Brown followed in his opinion the reasoning and conclusion of Judge Dillon, in the case of *Jordan* v. *Cass Co.*, Fed. Cas. No. 7517, where there is a full consideration of the question of the propriety of entering a judgment against a county in the name of which bonds had been issued for one of its townships. The township was the real debtor, but it was not a corporation. The debt could only be paid by taxes levied upon the lands of the township. Judge Dillon was of opinion that a judgment ought to be rendered against the county, and that even within common law precedents it could be framed so as to effectuate the rights of the parties. He said:

'But the common law adjudications show that the judgment may be molded so as to conform to the rights of the parties under the law and by analogy support the view we take. Thus in *Peck* v. *Jenness*, 7 How., 612, where plaintiff attached the goods of his debtor before the latter was proceeded against in bankruptcy, and where, pending the action, the debtor was discharged, the Supreme Court of the United States held that it was competent and proper for the court to render a judgment, notwithstanding the discharge, for the amount of the debt, damages and costs, "to be levied only on the goods of the defendant attached on plaintiff's writ, and not otherwise." "The books," says Mr. Justice Grier in this case, "are full of precedents for such judgment." When an administrator pleads *plene administravit*, the plaintiff may admit the plea, and take judgment of assets *quando acciderint*.

When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the plea, and have judgment to be levied only of defendant's future effect. (*Peck* v. *Jenness*, 7 How., 623.) So, subsequently, the supreme court held that when contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars. (*Bronson* v. *Rodes*, 7 Wall., 229.) Upon the whole our judgment is that the action is well brought against the county; that the county may make defense, but if the plaintiff shall be found entitled to recover, he may have judgment against the county for his debts, damages and costs, to be enforced, if necessary, by mandamus against the county court, or the judges thereof, to compel them to levy and collect a special tax according to the statute in such case provided, and not otherwise. Demurrer overruled.'

'The reasoning of Judge Dillon in this case met with the unqualified approval of the supreme court in *County of Cass* v. *Johnson*, 95 U. S., 360, and has been followed by this court *in Breckenridge Co.* v. *McCracken*, 22 U. S. App., 115, 9 C. C. A., 442, and 61 Fed., 191. The affirmation of Mr. Justice Brown's judgment in this case shows the concurrence of the supreme court in his view that the same principle was applicable to the drain warrants in this case which Judge Dillon had applied in respect to bonds issued for township purposes, in the name of the county. The theory on which the judgment against the county in such cases is entered is that the county is the trustee to apply a particular fund, when collected, to the payment of the indebtedness; and therefore that a judgment may properly be rendered against the county, to be made from the particular fund created by the levy of taxes on certain described lands. But we do not see how this limitation upon enforcing the judgment renders it any less a judgment for the recovery of money. A judgment against an executor, though it is *de bonis testatoria*, is none the less a judgment for the recovery of money. The fact that the judgment does not involve the personal liability of the defendant cannot affect its character as a money judgment. That is a money judgment which adjudges a defendant either as an individual or in a representative capacity, absolutely liable to pay a sum certain to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs. Thus tested, the original judgment rendered against Gratiot county was a money judgment, and it is not material that its enforcement was limited to process of taxation against cer-

tain lands in the county. It is true that Mr. Justice Brown, in his opinion, says, in effect, that such a judgment was practically only a formal means of procuring mandamus proceedings, and that the supreme court in *Davenport* v. *County of Dodge*, 105 U. S., 237, uses similar language; but this cannot, and was not intended, to change the exact legal character and effect of the judgment which was rendered. Certainly Mr. Justice Brown did not so intend, for he took the bond sued on in this case. It was not a judgment for a mandamus, because the circuit court is without jurisdiction to render such judgment. It is a judgment for money, which, not being enforceable except by mandamus, justifies the resort, under Section 716, to this ancillary writ by way of executing the judgment for money."

The pith of the proposition is most tersely stated by Judge Taft on page 700, where he says:

"The theory on which the judgment against the county in such cases is entered is that the county is the trustee to apply a particular fund, when collected, to the payment of the indebtedness; and therefore that the judgment may properly be rendered against the county, to be made from the particular fund created from the levy of taxes on certain described lands."

And again, he says:

"The fact that the judgment does not involve the personal liability of the defendant cannot affect its character as a money judgment. That is a money judgment which adjudges a defendant either as an individual or in a representative capacity absolutely liable to pay a sum certain to the plaintiff and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged with interest and costs."

The case of *Huidekoper* v. *Hadley*, 177 Fed., 1, follows and illustrates and applies the same general rule. There the plaintiff alleged certain particular legal rights to have the state official perform the duties enjoined upon them by the state statutes; showed

that he would be injured by a failure of the said state officers to perform said legal duties.

The federal court did not acquire jurisdiction by issuance of its original writ of mandamus in that case, but acquired jurisdiction by the assertion of a legal right and the adjudication of that right and the rendering of its decree and the fact that thereafter its writ of mandamus was issued in aid thereof and the fact that the prayer for the writ was contained in the petition does not make it an original proceeding in mandamus, to which jurisdiction could not attach in the federal court. The prayer for the writ, and the issuance of the writ are ancillary to and in aid of the execution of the rights decreed by the court to vest in the plaintiff.

The petition in this case alleges that the plaintiff is a depositor in the Farmers & Merchants Bank, at Sapulpa, Oklahoma, and that as such it is entitled to be paid the amount of its deposit out of the depositors' guaranty fund of the state of Oklahoma, which is in the possession and under the control of the defendants, as members of the state banking board; that it is the duty of the defendants to pay plaintiff out of such fund and that such fund was created and exists, out of which he may be paid.

The prayer in the petition says:

> "The plaintiff prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the plaintiff is the owner of and entitled to said deposit and said certificate of deposit and interest thereon, and is entitled to have the same paid out of the depositors' guaranty fund, created under and by virtue of the laws of Oklahoma, and in the possession and under the supervision and management of the state banking board, composed of John J. Gerlach, A. D. Kennedy and W. F. Barber, defendants herein."

Those are the rights asserted and that is the remedy sought, namely, a judgment against the state banking board, adjudging and decreeing that the plaintiff is a depositor, and as such is enti-

tled to be paid out of the depositors' guaranty fund, in the possession of the defendants.

The petition further prays that in case the depositors' guaranty fund on hand is insufficient to pay the depositors of said bank, and other indebtedness chargeable against the same, that the plaintiff be and is entitled to have issued to plaintiff certificates of indebtedness, etc., and further prays that the defendants be ordered, commanded and required to levy an assessment as required by law.

The latter, of course, is the relief that would be sought if the banking board failed to perform the judgment rendered by the court adjudging them bound to pay the debt due the plaintiff.

No issuance of a writ of mandamus is prayed for before judgment is rendered. The jurisdiction of this court does not attach by reason of the issuance of any original writ of mandamus. A judgment is sought against the state banking board ordering, adjudging and decreeing the right of the plaintiff, and directing in case such judgment is rendered and is not performed by the state banking board that a writ of mandamus shall issue in aid of such judgment, to compel the state banking board to levy an assessment provided by law for the creation of the fund necessary for the relief given by the court, and such a judgment rendered against the state banking board, payable out of the depositors' guaranty fund in the possession of the state banking board, is a judgment "for the recovery of money" within the meaning of the law, as stated in *Fuller* v. *Ayleswerth*, 75 Fed., *supra*.

ARGUMENT UNDER POINT TWO.

In the case of *Huidekoper* v. *Hadley*, 177 Fed., 1, it was held:

"The Missouri legislature to execute, Const., Art. 10, Sec. 3 (Ann. St. 1906, p. 275), providing that taxes shall be uniform on the same class of subjects within territorial limits of the authority levying the tax, provided a scheme for equaliz

ing the valuation of property among all the counties of the state, based on actual value, by Rev. St. 1899, Sec. 9127 (Ann. St. 1906, p. 2116), and to work out such scheme, created a state board of equalization, by Const., Art. 10, Sec. 18 (Ann. St. 1906, p. 293), and by Rev. St., Sec. 9127, charged such board with the duty of equalizing property as classified by the legislature. *Held*, that such board had no discretion to divide the counties of the state into several groups and equalize the different classes of property only within each group, and hence mandamus was maintainable to compel the members of the board, other than the Governor, to equalize the assessment throughout the state."

In that case the state board of equalization was composed of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General, and were invested by the state with the power to equalize the value of property in the several counties in the state for the purpose of taxation.

It is worthy to note that the officials constituting this board of equalization were the heads of both the executive and the administrative departments of the state government, and the highest officers in the state, their powers and duties consisting of handling for the state, the state funds and in performing for the state the highest functions of state government, the equalization of property values, and collecting taxes, mandamus was to compel the board to act in a certain manner, claiming that the actions which they had taken, or were about to take were contrary to law, and that the exercise of their discretion was contrary to law.

It was there contended with great force and learning by its counsel that it was a suit against the state, the same as is contended for in this case.

We contend no better answer to that question can be found than in the learned opinion of the court in the above case, from which we quote at length (l. c. pages 5 to 8), which is as follows:

"Is this proceeding a suit against the state? Section 9140 Rev. St. Mo. 1899, (Ann. St. 1906, p. 4210) provides that the

assessor of each county shall take an oath to faithfully and impartially perform the duties of his office and to assess all the property in the county at what he believes to be its actual cash value.

Sections 9127 and 9195 provide that a statement or abstract of the taxes so assessed in each county shall be forwarded to the state auditor on blanks furnished by him, to be laid before the State Board of Equalization.

The Constitution of the state, (article 10, Sec. 18) creates the board and ordains that:

'There shall be a state board of equalization consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties of the state and it shall perform such other duties as are now or may be prescribed by law.'

Section 9126 provides that a majority of the members of the board shall constitute a quorum, and that the members shall each take an oath or affirmation that he will 'to the best of his knowledge and ability, equalize the valuation of real and personal property among the several counties in the state, according to the rules prescribed by this chapter for equalizing and valuing real property.'

Section 9127 provides that the board after receiving from the auditor abstracts or statements of all the taxable property in the state, and after classifying the same under certain headings shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

'First, it shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money, such per centum as will increase the same in each case to its true value. Second, it shall deduct from the valuation of each class, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value.'

This brief epitome of legislation clearly discloses that the policy of the state requires property to be assessed on the basis of its true value in money and that a duty is cast upon the State Board to equalize the property among the several counties of the state on that basis. Without now discussing the exact nature of that duty, its extent, or is limitations, it is sufficient, for our present purpose to observe that it is an imperative duty imposed by the law of the state. A majority of its members

constituting a working quorum refused to permit the board to perform that duty and compelled it to decline to do so. In so acting they did not stand for the state of Missouri and were not the state within the meaning of the eleventh amendment of the Constitution. A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its laws it spoke to its servants and commanded them to do something. Certainly those servants by their act of disobedience do not represent or stand for the state. This suit, therefore, instead of being against the state, is against its servants to compel them to do a duty which, by accepting office they agreed to perform."

The gist of the whole matter is set out with great clearness by Judge Adams, in the opinion where he says:

"A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its laws it spoke to its servants and commanded them to do something. Certainly those servants by their act of disobedience do not represent or stand for the state."

The state of Oklahoma, speaking through its laws created the state banking board, and directed it to supervise and control the depositors' guaranty fund, and placed said fund in its keeping, and the state through the same law commanded the state banking board to *pay all depositors of failed banks in full.*

If the state banking board violated the duties imposed upon it by the state of Oklahoma and failed to perform such duties, do they represent, and are they the state of Oklahoma, while so doing? On the contrary is it not true that the law was made to be enforced and that when they violate their duty they not only do not represent the state and are not the state of Oklahoma, but are acting in defiance of the law of the state that created them, and a proceeding to compel the performance of those duties is not only not a suit against the state, but in effect for the state to enforce the legal obligations created and imposed by the state. The sovereign state

being presumed not only to be willing that its laws should be obeyed, but interested in compelling obedience.

The many leading cases cited in this opinion fully illustrates the position of the supreme court in respect to this question, as well as the circuit court of appeals, and clearly distinguishes this class of cases from the cases which come under the 11th amendment of the Federal Constitution.

In what higher sense can it be claimed that the state banking board represents the state of Oklahoma than does the state board of equalization, composed of all of the state officers, and the highest representative of the state. The power to levy and collect taxes is the highest governmental power exercised by the state government. In the exercise of those powers lie the highest functions of state government. The taxes when levied and collected constitute the revenues of the state government, and are its property and belong solely and exclusively to the state for state purposes. Its very life is conditioned upon and its government depends upon the exercise of those powers. This is true both of state and federal government. The depositors' guaranty fund is not created for state purposes, but was created for a special purpose, namely to pay depositors of failed banks, and the same statute that created the depositors' guaranty fund placed the fund in the possession and under the control of the state banking board, and commanded them to pay all of the depositors of failed banks in full, out of that fund.

The fund was not created for and the money cannot be used for state purposes, under any conditions whatever. While the legal title to the funds may be in the state, but the state has no right to use it, or to dispose of it in any way, and has no control of it. It is under the control and management of the state banking board, and they can only use it to pay depositors of failed banks, or depositors' guaranty fund warrants, issued to the depositors of failed banks.

State officers in every department of the government in every

state within the Union, from the organization of its government down to the present time have been compelled by the highest courts in each and every state, and by the federal court, to perform the duties enjoined upon them by law, at the instance of those who may be injured by a failure to perform those duties. The Supreme Court of no state has ever refused to grant this remedy, and it is now too well settled law to be seriously questioned.

By what course of reasoning can it be held that the state banking board, vested with administrative and ministerial duties, prescribed by the statute creating it, to collect a specific fund, and commanding it to pay out that specific fund for a clearly defined and specific purpose, are higher and have greater powers and duties than the governmental powers exercised by state officials and state boards of equalization, or that they are immune from legal proceedings, and their acts can in no way be controlled by courts of law or equity; that they are higher than the law that created them, and their acts and proceedings are not amenable to law, or regulated or controlled by law.

The contention that a proceeding against the state banking board is a proceeding against the state is refuted completely by the cases of *Lankford* v. *Oklahoma Engraving & Printing Co.,* 130 Pac., 278, and *State* v. *Cochrell, 27* Ok., 630, 112 Pac., 1000.

The first of these cases was a proceeding to enjoin the state bank commissioner, and the latter case was a proceeding by mandamus against the state bank inspector with reference to the performance of his official duties, both of which proceedings were held proper, by the supreme court of Oklahoma, and were not held to be proceedings against the state.

We desire to call the court's special attention to the language of Chief Justice Waite, in the case of *Rolston* v. *Missouri Fund Commissioners,* 120 U. S., 390, speaking of the case of *Louisiana* v. *Jumel,* 107 U. S., 711, which latter case is quoted by the Attorney General, in which Chief Justice Waite uses this language:

"But this case is entirely different from that. There (that is *La.* v. *Jumell*) the effort was *to compel a state officer to do what a statute prohibited him from doing.* Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state." (This language will be found 177 Fed., 7.)

Rolston v. *Fund Commissioners of Missouri*, 120 U. S., 390, 30 L. Ed., 721 holds:

"A suit against a state officer to compel him to do what a statute requires of him is not a suit against the state, within the meaning of the Eleventh Amendment.

And the court speaking through Chief Justice Waite, on page 728 says:

"It is next contended that this suit cannot be maintained because it is in its effect a suit against the state which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana* v. *Jumell*, 107 U. S., 711 (27: 448), is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what the statute requires of him. The litigation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officers say they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied."

This case is directly in point. The law makes it the duty of the state banking board to pay depositors of failed banks. Complainant says it is a depositor. The state banking board says it is

not. The only inquiry is therefore as to the fact of whether it is a depositor.

If complainant is a depositor, it is the duty of the state banking board to pay it. If the court finds that complainant is a depositor, then complainant is entitled to a decree.

Graham v. *Folsom,* 200 U. S., 248, 50 L. Ed., 464 holds:

> "Mandamus to compel county auditors and county treasurers to levy a tax to pay a judgment on township bonds is not a suit against the state, within the inhibition of the Federal Constitution, because such officers have been forbidden by the state legislature to exercise any such power."

This court speaking through Mr. Justice McKenna, on page 469 says:

> "It is further contended by plaintiff in error that this is, in effect a suit against the state. The argument to support this contention is that, if the auditor and treasurer are not corporate authorities, as it is insisted the circuit court decided they are necessarily 'state officer,' and, being state officers, this proceeding is an attempt to require of the state the performance of her contract." The reasoning by which this is attempted to be sustained is rather roundabout. It is based in part on distinctions which, it is contended, were made by the circuit court, and on the assumption that the circuit court decided that the levy of taxes prescribed by Sec. 9 of the statute under which the bonds were issued was a levy by the legislature and the taxing officers state officers. This proceeding, hence, it is argued, becomes a proceeding against the state, and 'the relief sought is to require of the state the performance of her contract,' by the coercion of her officers to the performance of duties which she has, by statute forbidden. And, it is said, it may be admitted that such statute 'is unconstitutional and therefore void;' nevertheless, the relief asked against the officers is 'affirmative official action,' which the political body of which they are the mere servants has forbidden them to exercise,' and it is not competent for a court to compel them to

exercise, because of the immunity of the state from suit under the Constitution of the United States. To sustain these contentions an elaborate argument is presented and a number of cases cited. The most direct of the cases are *Louisiana* v. *Jumell*, 107 U. S., 711, 27 L. Ed., 448, 2 Sup., Ct. Rep., 128; *Hagood* v. *Southern*, 117 U. S., 52, 29 L. Ed., 805, 6 Sup. Ct. Rep., 608; *Rolston* v. *Missouri Fund Comrs.*, (*Rolston* v. *Crittenden*) 120 U. S., 411, 30 L. Ed., 728, 7 Sup., Ct. Rep., 599; *Re Ayers*, 123 U. S., 443, 31, L. Ed., 216, 8 Sup., Ct. Rep., 164; *Pennoyer* v. *McConnaughy*, 140, U. S., 1, 35, L. Ed., 363, 11 Sup., Ct. Rep., 699. It would make this opinion too long to review these cases. Nor is it necessary. It is enough to say that they do not sustain the contentions of plaintiff in error."

Smyth v. *Ames*, 169, U. S., 518, 42 L. Ed., 819 holds:

"A suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the state within the meaning of the 11th Constitutional Amendment."

This court speaking through Mr. Justice Harlan on page 839 says:

"But to prevent misapprehension, we add that within the meaning of the 11th Amendment of the Constitution the suits are not against the state but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violati g the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing unconstitutional enactment to the injury of the plaintiff is not a suit against the state within the meaning of that Amendment. *Pennoyer* v. *McConnaughy*, 140, U. S., 1, 10 (35: 363, 365); *Re Tyler*, 149, U. S., 164, 190, (37: 689, 698); *Scott* v. *Donald* (No. 1), 165, U. S., 58, 68, (41: 632, 633); *Tindal* v. *Wesley*, 167, U. S., 204, 220 (42: 137, 142)."

Taylor et al. v. *Louisville & N. R. Co.*, 88 Fed., 350 holds:

> "A suit against state officers to enjoin them from certifying a tax, which they claimed to do by authority of the state, but which complainant avers to be without lawful authority, is not a suit against the state, within the meaning of the eleventh amendment."

Ex Parte Young, 209 U. S., 123, 52 L. Ed., 714, holds:

> "A federal court may enjoin the attorney general of a state, whose general duty is to enforce the state statutes, from proceeding to enforce, against persons affected, a state statute which violates the Federal Constitution, such proceeding being not prohibited by the provision of the Federal Constitution forbidding the maintenance of action against a state."

And on pages 725 to 729 inclusive, the court speaking through Mr. Justice Peckham, reviews all the leading authorities on this question, and it would seem that the rule is settled that a proceeding against a state official to compel the performance of a duty enjoined on him by law, or to prevent the performance of a duty such official seeks to perform, alleged to be in violation of the law, is not a suit against the state, within the meaning of the Federal Constitution.

REVIEW OF AUTHORITIES CITED BY APPELLANTS.

Decatur v. *Paulding*, 14 Pet., 497, 10 L. Ed., 559 cited by appellants, is not in point.

The gist of that case is stated in the opinion by Mr. Justice Ketron, on pages 570 and 571 where he says:

> "Stripped of the slight disguise of legal forms such is the case before us; the conflict between the executive and judiciary department could not well be more direct nor more dangerous. The idea that they are distinct, and their duties separate, is confounded, if the jurisdiction of the court below is sustained;

placing the executive power at its mercy, in case of all contested claims. Few can be more contested than the one before us; if jurisdiction can be exercised in this instance, it is difficult to see in what others it does not exist; to establish which we will briefly recapitulate the leading facts. On the 3rd of March, 1837, a resolution was passed by Congress giving a pension of the half pay of the late Captain Decatur to the petitioner, his widow; and on the same day a bill passed giving an equal pension to all the widows of naval officers and seamen who had died in the service; with this difference in the general law and the resolution, that by the former the half pay continued for life, and by the resolution only for five years, if the petitioner so long lived and continued a widow. She claims by her petition not only the half monthly pay proper of a post captain of the navy, but for daily rations, eight, at twenty-five cents each amounting to one half of seven hundred and thirty dollars per annum, and also interest on the sum withholden. These claims for back rations and interest are contrary to the construction given by the government to the navy pension acts, for more than forty years. To cover a failure, should the court concur with the executive departments in rejecting these claims, the petition has a double aspect in the form of a bill in equity; first, praying for the whole sum of eighteen thousand five hundred and ninety-seven dollars, or such part or portion thereof as the court may direct.

It was first called on to decide whether the United States owed the petitioner anything; second, how much; and, third, whether there was any money in the treasury belonging to the navy fund, out of which the claim could then be satisfied.

* * *

But the great question was decided below that the court have jurisdiction and power to order money to be paid out of the Treasury of the United States, by a writ in the nature of an execution, running in the name of the United States, commanding the governmet to obey its own authority.

* * *

I maintain the executive power of this nation headed by the president and divided into departments in its administration of the finances of the country, acts independent of the courts of justice in paying the public creditors, and that the decision of the Secretary of the Navy in this case, affirmed by the President, under the advice of the Attorney General, was final on the laws as they stood, and that the petitioner could only appeal to Congress."

The United States Court is asked in this case to control by mandamus the exercise of the executive power of the nation headed by the President, and divided into departments in its administration of the finances of the country. The government was asked to issue a writ in the nature of an execution running in the name of the United States commanding the government to obey its own authority, ordering money to be paid out of the United States treasury.

In the case of *Governor of Georgia* v. *Madrazo*, 1 Pet., 110, 7 L. Ed., 73, the court held that a proceeding against the governor of Georgia in his official capacity, for property in his possession as Governor was a proceeding against the state.

Mr. Justice Marshall on pages 79 and 80 says:

> "The claim upon the Governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially.
>
> The decree is pronounced not against the person, but against the officer, and appeared to have been pronounced against the successor of the original defendant, as the appealed bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.
>
> But were it to be so admitted that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an Act of Congress, and has done nothing in violation of any law of the United States.
>
> The decree is not considered as made in a case in which

the governor was a defendant in his personal character; nor could a decree against him in that character, be supported.

The decree cannot be sustained as against the state, because, if the 11th amendment to the constitution does not extend to proceeding in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as a suit prosecuted not against the state, but against the thing, because the thing was not in possession of the District Court."

Smith v. *Reeves*, 178 U. S., 436, 44 L. Ed., 1140, was a proceeding against the state treasurer of California, to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiff.

Mr. Justice Harlan in rendering the opinion said, pages 1142-1143:

"Is this a suit to be regarded as one against the state of California? The adjudged cases permit only one answer to this question. Although the state as such, is not made a party defendant, the suit is against one of its officers, as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal* v. *Wesley*, 167 U. S., 204, 221, 42 L. Ed., 137, 143, 17 Sup., Ct. Rep., 770, and authorities cited. In the present case the action is not to recover specific moneys in the hands of the state treasurer, nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the state to pay a certain amount of money on account of the payment

of taxes alleged to have been wrongfully exacted by the state from the plaintiff. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their person or property, but one in effect to compel the state, through its officer, to perform its promise to return to tax payers such amount as may be adjudged to have been taken from them under an illegal assessment.

The case in some material aspects is like that of *Louisiana* v. *Jumell,* 107 U. S., 711, 726, 728, 27 L. Ed., 448, 453, 454, 2 Sup., Ct. Rep., 128, 140, 142. That was a proceeding by mandamus against officers of Louisiana to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the state, but which it subsequently refused to recognize as valid obligations and directed its officers not to pay. This court said, "It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts; but the law nowhere requires the setting apart of this fund any more than others from the common stock. In the treasury all funds are mingled together, and kept so until called for to meet specific demands. * * * The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no further argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this court is very far from authorizing the courts when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

We are clearly of the opinion that within the meaning of the constitutional provisions relating to actions instituted by

private persons against a state, this suit, though in form against an officer of the state, is against the state itself. *Re Ayers*, 123 U. S., 443, 31 L. Ed., 216, 8 Sup., Ct. Rep., 164, *Pennoyer* v. *McConnaughy*, 140 U. S., 1, 10, 35 L. Ed., 363, 365, 11 Sup., Ct. Rep., 699."

This case was not a proceeding to recover a specific fund in the possession of the treasurer of the state, nor to compel the application of a specific fund, already in his possession as treasurer to the uses for which they were deposited with him. But this case was a general claim payable out of the general state funds in his charge.

In this case as in the Jumel case, *supra*, there is no law requiring the treasurer to pay the amount out of the common fund. In the treasury all funds are mingled together and kept so. The general state funds in the possession of the Treasurer are subject to the control of the executive and legislative branches of the state government and the court in order to grant and make effective the remedy sought would be required to assume and exercise the executive authority of the state.

In the case at bar the depositors' guaranty fund is not a part of the general state funds in the possession of the state treasurer; is not mingled with other state funds; is not applicable to, or usable by the state to pay state debts or obligations, but is kept separate from all other funds, and created solely by the assessment of state banks, placed in the exclusive possession and control of the state banking board, who are its sole custodians, and who are not the legal custodians of any other state funds whatever, and the fund is applicable solely to the payment of depositors of failed banks. No other use can be legally made of it by the state banking board, or by the state, or by any official of the state. The obligations payable out of this fund—namely the depositors of failed banks are not obligations of the state. The state being in nowise legally bound

to pay them. The fund itself is not created by the state by the exercise of the power of taxation, and could not be.

The fund is created by the exercise of the police power of the state for the protection of the depositors of failed banks, and for no other purpose, and cannot be used for any other purpose otherwise the purpose of its creation wholly fails.

In the case of *Re Ayers*, 123 U. S., 443, 31 L. Ed., 216, the state of Virginia issued a large number of bonds bearing interest coupons which she thereby contracted should be received in payment of all taxes, etc, due to her.

In that case the court held:

> "A suit by aliens, the object of which is to enjoin the Attorney General and the Commonwealth's attorneys of the several counties, cities and towns of Virginia from bringing any suit in the name of the Commonwealth to enforce the collection of taxes for the payment of which coupons originally attached to her bonds had been tendered, is a suit which the Circuit Court of the United States had no jurisdiction to entertain; such suit is, in law and fact a suit by subjects of a foreign state against the State of Virginia, and within the prohibition of the Eleventh Amendment to the Constitution.
>
> For a breach of its contract by the state, there is no remedy by suit against the state itself; and a bill the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, is a suit against the state.
>
> In such case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the state."

This case is clearly not applicable to the case at bar. The case at bar is not a proceeding to enforce payment of any debt or contractual liability of the state of Oklahoma whatever. The obligation to pay the depositors of failed banks is not a state debt or

liability of the state of Oklahoma. The state is not in any event liable therefor. The state has not contracted or agreed in any event to become liable therefor. By a provision in the Bank Guaranty Law itself the state is relieved from all liability therefor. By the provisions of that law the fund is created by assessing the banks to be benefited, and that fund is made payable to the depositors of failed banks, and when the fund is exhausted, or when insufficient funds have been collected by assessment of banks, then the depositors of failed banks must lose.

The case of *Pennoyer* v. *McConnaughy*, 140 U. S., 1, 35 L. Ed., 363 holds, that a suit against the officers of a state to compel them to do acts which constitute the performance by it of its contracts, is, in effect, a suit against the state itself

This case is wholly inapplicable to the case at bar. The case at bar is not a proceeding to compel the officers of the state of Oklahoma to perform any contract of that state. The duty to pay depositors of failed banks is not a contractual obligation of the state of Oklahoma, and is not an obligation of the state at all. It is a duty imposed upon the state banking board, and which by accepting the office, they agreed and became bound to perform.

Louisiana v. *Jumel*, 107 U. S., 711, 27 L. Ed., 448, was cited by Mr. Chief Justice Waite in *Rolston* v. *Crittenden*, 120 U. S., 390, 30 L. Ed., 720, in which he said:

> "This case is entirely different from that (*La.* v *Jumell*). There the effort was to compel a state officer to do what the statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer and not the state."

Appellants cite *La.* v. *Jumell*, *supra*, in support of their contention that the depositors' guaranty fund is a state fund, and that a proceeding to compel payment out of it is in fact a proceeding against the state.

In the Jumell case the proceeding was against the board of liquidation composed of the governor and all executive officers of the state. Mr. Chief Justice Waite in his opinion, (*27* L. Ed., 448, l. c., 452 and 453) says:

> "The individual defendants are the several officers of the state, who, under the law, compose the board of liquidation. That board is, in no sense, a custodian of this fund. Its duty was to negotiate the exchange of the new bonds for the old on the terms proposed. It had nothing to do with levying the tax, collecting the money or paying it out, further than by purchasing the bonds with any surplus there might be from time to time in the treasury over what was required to meet the interest. * * *
>
> The Treasurer of State is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over to the state treasurer, that is to say, into the state treasury, just as other taxes were then collected. The treasurer is no more a trustee of these moneys than he is of all other public moneys. * * *
>
> In *Board of Liquidation* v. *McComb*, 92 U. S., 531 (XXIII, 623), which arose under the same Act of 1874, that we are now considering, the board of liquidation was enjoined at the instance of bondholders from admitting to the privileges of the compromise proposed by the state, certain persons other than those originally provided for in different terms. And this clearly because the board of liquidation was by the very terms of the law charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose, and every *bona fide* bondholder by accepting the compromise offered, became personally interested in securing the due administration of the trust which had thus been committed to the board. In fact, the board held the new issue of bonds in trust, and everyone who gave up his old obligations and accepted the new in settlement, became a beneficiary under the trust and might act accordingly.
>
> In this case, however, there is no such trust. As has already been said, the board is charged with no duty in respect to the taxes, except in connection with the purchase of bonds, whenever there are funds which can be used in that way."

It thus appears there is no separate fund created and placed in the possession of the board, coupled with a mandatory duty prescribed by law, with reference to its payment, as in the case at bar.

Cunningham v. *Macon & Brunswick Ry. Co.*, 109 U. S., 446, 27 L. Ed., 992, was a proceeding against the governor and other officers of the state of Georgia, and an effort to enforce the contractual obligations of the state guaranteeing payment of railroad bonds, where the title to the property securing the bonds was in the state.

In *Murray* v. *Wilson Distilling Co.*, 213 U. S., 150, 53 L. Ed., 742, the State of South Carolina engaged in the business of buying and selling liquor. The Supreme Court of South Carolina in that case said, in *State ex rel. Hay* v. *Farnum*, 73 S. C., 165, 53 S. E., 83:

> "The offices and place of business of the dispensary stand precisely in the same relation to the state as the state treasurer's office."

And speaking of the dispensary system, it was said:

> "The state has undertaken to take charge of the entire liquor business of the state, and to prohibit any private person or corporation from dealing in liquor, except as they may find warrant in the Constitution and laws of the United States."

Mr. Justice White in the opinion, on page 750, says:

> "If we consider as an original question the provisions of the Constitution of South Carolina on the subject, and the terms of the statutes of that state, establishing the dispensary system, we think it is apparent that the purchases which were made by the state officers or agent, of liquor for consumption in South Carolina, were purchases made by the state for its account, and that the relation of debtor and creditor arose from such transactions between the state and the person who sold the liquor. And this irresistible conclusion arising from the very face of the Constitution and statutes, is removed beyond all possible controversy by the decision of this court in *Vance*

v. *W. A. Vandercook Co.*, 170 U. S., 438, 42 L. Ed., 1100, 18 Sup. Ct. Rep., 674, and by the construction given by the Supreme Court of South Carolina to the state statute prior to the commencement of this litigation in *State ex rel. Hay* v. *Farnum*, 73 S. C., 165, 53 S. E. 83, as well as by the convincing opinion expressed by that court in reviewing the state statutes in the mandamus case already referred to, as reported in 79 S. C., 316, 60 S. E., 928.

We could not therefore sustain the exercise of jurisdiction by the circuit court without in effect deciding that the state can be compelled by compulsory judicial process to perform a contract obligation."

It thus appears beyond question by both the decision of the Supreme Court of South Carolina and this court that debts created by the purchase of liquor were state debts, and relations existing between the state and creditors were contract obligations and funds derived from the sale of liquor were the property of the state and *were placed in its general revenue* the same as other state funds in the possession of the state treasurer, and subject to the control of the executive and legislative branches of the state government, the same as all other state funds, and could be used by the state for all fiscal purposes.

And this court held further that the winding up Act of 1907 did not change the relation of debtor and creditor between the state and the seller of liquor, and the state did not thereby renounce its control over the assets of the state dispensary.

ARGUMENT UNDER POINT THREE.

Smyth v. *Ames*, 169 U. S., 518, 42 L. Ed., 819, holds:

"One who has a right to sue in equity in a federal court cannot be deprived of that right because he can sue at law in a state court on the same cause of action."

On page 838 this court in a very learned opinion fully covers this subject, and we quote at length from the opinion where the court says:

> "The first question to be considered is one common to all cases. While it was not objected at the argument that there had been any departure from the 94th equity rule, it was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States sitting in equity, was therefore without jurisdiction. This objection is based upon the 5th section of the Nebraska statute authorizing any railroad company to show, in a proper action brought in the supreme court of the state, that the rates therein prescribed are unreasonable and unjust, and if the court found such to be the fact, to obtain an order upon the board of transportation permitting the rates to be raised to any sum in the discretion of that board, provided that in no case should they be fixed at a higher sum than was charged by the company on the 1st day of January, 1893. This section, it is contended, took from the Circuit Court of the United States its equity jurisdiction in respect to the rates prescribed and required the dismissal of the bills.
>
> We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court, is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. Case of Broderick's Will (*Kieley* v. *McGlynn*), 88 U. S., 21 Wall, 503, 520 (22:599, 606); *Holland* v. *Challen*, 110 U. S., 15, 24 (28:52, 56); *Dick* v. *Foraker*, 165 U. S., 404, 415 (39:201, 205); *Bardon* v. *Land & River Improv. Co.*, 157 U. S., 327, 330 (39:719, 721); *Rich* v. *Braxton*, 158 U. S., 375, 405 (39:1022, 1032). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper court of the United States when-

ever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction. *Payne* v. *Hook*, 74 U. S., 7 Wall., 425, 430 (19:260, 262); *McConihay* v. *Wright*, 121 U. S., 201, 205 (30:932, 933). A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state court of the same locality; that the wise policy of the Constitution gives him a choice of tribunals.

Davis v. *Gray*, 83 U. S., 16 Wall., 203, 221 (21:447,453); *Cowley* v. *Northern Pacific Railroad Co.*, 159 U. S., 569, 583 (40:263, 267). So wherever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory, invaded by unauthorized acts of its own officers, to suits for redress in its own courts. *Reagan* v. *Farmers Loan & Trust Co.*, (No. 1), 154 U. S., 362, 391 (38:1014, 1021, 4 Inters. Com. Rep., 560); *Mississippi Mills* v. *Cohn*, 150 U. S., 202, 204 (37:1052, 1053); *Cowles* v. *Mercer County*, (*Mercer County Supers.* v. *Cowles*), 74 U. S., 7 Wall., 118 (19:86); *Lincoln County* v. *Luning*, 133 U. S., 529 (33:766); *Scott* v *Neely*, 140 U. S., 106 (35:358); *Chicot County* v. *Sherwood*, 148 U. S., 529 (37:546); *Cates* v. *Alton*, 149 U. S., 45 (37:801)."

ARGUMENT UNDER POINT FOUR.

The statute creating the depositors' guaranty fund and defining its use provides:

"Section 3. There is hereby levied against the capital stock of each and every bank organized and existing under the laws of this state, an annual assessment equal to one-fifth of one per cent., and no more, of its average daily deposits during its continuance as a banking corporation, for the purpose of creating a depositor's guaranty fund; provided, that the state banking board in their discretion may levy an additional special assessment of one-fifth of one per centum as provided herein during the fiscal years ending June 30th, 1914; June 30, 1915, and June 30, 1916. Such fund so created shall be known

as the Depositors' Guaranty Fund of the State of Oklahoma, *and shall be used solely for the purpose of liquidating deposits of failed banks, and retiring warrants provided for in this Act.*"

Sections six and eight of the Banking Law are as follows:

"Section 6. In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this Act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company, is insufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 2, the amount necessary to make up the deficiency and the state shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund.

* * *

Section 8. The Bank Commissioner shall deliver to each bank or trust company that has complied with the provisions of this Act, a certificate stating that said bank or trust company has complied with the laws of this state for the protection of bank depositors, and that safety of its depositors is guaranteed by the Depositors' Guaranty Fund of the State of Oklahoma. Such certificate shall be conspicuously displayed in its place of business and said bank or trust company may print or engrave on its stationery and advertising matter words to the effect that its depositors are protected by the Depositors' Guaranty Fund of the State of Oklahoma. Provided, however, that hereafter all banks operating under the guaranty law of the state of Oklahoma shall be permitted to advertise that their deposits are guaranteed by the depositors' guaranty fund, but that no bank shall be permitted to advertise its deposits are guaranteed by the State of Oklahoma, and any bank or bank officer or employee who shall advertise their deposits as guaranteed by the State of Oklahoma, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding Five Hundred ($500.00) Dollars, or by imprisonment in the county jail for thirty days or by both such fine and imprisonment in the discretion of the trial court."

The depositors' guaranty fund is created solely by the assessment of state banks. When a state bank fails, the law commands the state banking board to pay the depositors in full out of the depositors' guaranty fund.

The state is given a line on the assets of failed banks for the benefit of the depositors' guaranty fund for money paid to the depositors of failed banks. The law provides that the depositors' guaranty fund "shall be used for the purpose of liquidating deposits of failed banks, and retiring warrants provided for in this Act."

The fund is not created by exercising the taxing power of the state. Neither is the fund subject to any other use whatsoever by the executive or legislative branches of the government. It cannot be used to pay state indebtedness, or any expenses of the state government, or any general state purpose. It cannot be made a part of, nor mixed with, the state funds in the state treasury.

The State of Oklahoma does not possess and cannot exercise over this fund any of the rights and powers which it possesses and exercises over all state funds. In fact, the state of Oklahoma does not own this fund and does not possess nor exercise any power over its distribution, except to apply it to the use to which the fund, by the law of its creation is applicable, namely, to the payment of depositors of failed banks. When the state banks of Oklahoma have paid their assessments into this fund, under the law creating it, any act of the State of Oklahoma, or any of its officers, diverting or applying that fund to any other use than that provided in the law creating it, would be clearly unconstitutional and void.

The equitable and beneficial title to the depositors' guaranty fund is in the state banks who created it by paying their assessments into it, and the depositors of failed banks, who have the right to be paid the full amount of their deposits out of the depositor's guaranty fund. The state has no beneficent interest in it whatever.

In case the purpose for which it was created should be given

up, or in case it should not prove necessary to expend the entire fund to subserve the purpose of its creation, namely, to pay depositors of failed banks, no part of the fund would become the property of the state. It would still remain the property of the banks who created it.

This court speaking through Mr. Justice Holmes in the case of *Noble State Bank* v. *Haskell*, 219 U. S., 104, 55 L. Ed., 112, says:

> "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to the return of what remained of it, if the purpose were given up (see *Danby Bank* v. *State Treasurer*, 39 Vt., 92, 98), sti'l there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark* v. *Nash*, 198 U. S., 361, 49 L. Ed., 1085, 25 Sup. Ct. Rep., 676, 4 A. & M. Ann. Cas., 1171; *Strickley* v. *Highland Boy Gold Min. Co.*, 200 U. S., 527, 531, 50 L. Ed., 581, 583, 26 Sup. Ct. Rep., 301, 4 A. & E. Ann. Cas., 1174; *Offield* v. *N. Y., N. H. & H. R. Co.*, 203 U. S., 51 L. Ed., 231, 27 Sup. Ct. Rep., 72; *Bacon* v. *Walker*, 204 U. S., 311, 315, 51 L. Ed., 499, 501, 27 Sup. Ct. Rep., 289."

The basis of the constitutionality of the Act itself, as being a proper exercise of the police power of the state is that the purpose of the law is, as stated by Mr. Justice Holmes, to make the currency of checks secure, and to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand.

If the depositors' guaranty fund when created cannot be made available for the paying of depositors in failed banks, then neither object of the law has been made effective, the depositors of failed banks are not made secure, and the compulsory resort of depositors to banks, has not been made safe, and the purpose of the law wholly fails.

If a depositor has no justiciable right recognizable or enforceable in courts of justice, and if a depositor cannot be paid out of the funds provided for that purpose, then he is without remedy and the fund itself ceases to be any security for his deposit, for he has no method recognizable by law for enforcing his claim.

This court speaking through Mr. Justice Holmes, in case of *Noble State Bank* v. *Haskel, supra*, recognized the fundamental right of the depositors and banks contributing to the fund to have depositors paid out of the fund as the basis of the decision itself, holding that the Act is constitutional, and says: "We should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up," and he cites and approves the only case we have been able to find in the books, directly in point, namely, *Danby Bank* v. *State Treasurer*, 39 Vt.,92.

In the case of *Danby Bank* v. *State Treasurer*, 39 Vt., 92, the court holds:

> "When a bank ceases to do business in consequence of its insolvency, the bank fund then becomes chargeable for the indebtedness of the bank in excess of its property and assets.
>
> It is the duty of the state treasurer to pay over to a receiver of an insolvent bank so much of the bank fund as may be in the hands of the treasurer under the statute, and necessary to pay such indebtedness, upon the order of the court chancery.

The treasurer holds the money constituting the bank fund in which the state has no property, and he is charged with special duties in respect thereto."

The court therefore holds that mandamus is the proper remedy to compel the treasurer to pay over the funds.

And in rendering the opinion (page 98) the court said:

"The mode of creating the 'bank fund' and of continuing and replenishing it, in connection with the purposes for which it was created, and the provisions for administering it, shows clearly that it was designed to be and remain perpetual, subject to the purposes and provisions of law. The statute provides only two modes for appropriating and withdrawing money from that fund; one in payment of the debts of an insolvent bank, the other—in Sec. 13 of the chapter on banks in the compiled statutes—in repayment to a bank, of which the charter has expired, its proportional share of said fund."

And on pages 100 and 101 the court said:

"It is obvious from what has now been said, that, in the opinion of the court, it is the right of the receiver to have, and the duty of the treasurer to pay over to him so much of the 'bank fund' as is now in the hands of the treasurer under the statute, charged by the order of the court of chancery. To this extent the court has no doubt that a peremptory writ should issue. * * *

We think the treasurer holds the money as a specific fund in which the state has no property. He is charged with special duties in respect to that fund, and becomes responsible for the proper discharge of those duties. Whether in virtue of his official responsibility and his liability under his official bond to respond for his official defaults, the state sustains such a relation as to render it, in supposable cases, his duty to make good any deficiency in the 'bank fund,' the courts are called upon to decide or express views. For present purposes it need only be added, that all the provisions of the statute upon the subject, preclude the idea of that fund being absorbed by the state as a part of its general assets, with only the duty on the part of the state to permit an equal amount

to be taken from the treasury to answer the purposes of the statute as to that fund. * * *

In the next place the order can properly extend only to require him to do what it is his clear ministerial duty to do. That ministerial duty must be regarded as limited to the paying over of funds in his hands."

The fund in this is in all similar respects created in the same manner and for the same general purposes as in the case at bar. It is created by requiring the state banks to contribute to it and for the purpose of paying the debts of failed banks.

It should be further noted in this case that the contributions to the fund being placed in charge of a special officer, and only created for that purpose, it is deposited with the state treasurer, although the statute requires the state treasurer to keep the fund separate from the general state funds.

The court held, and we think very properly, that the fund is in no sense the property of the state; that the state has no interest in it; that the fund belongs to the banks who had contributed to its creation, and the depositors to whom it was payable, and that they have the absolute right to enforce payment out of this fund, and that it is the plain legal duty of the state treasurer to pay out of this fund, the debts of failed banks. And not only that, but the court holds that this duty is "a clear ministerial duty" and enforceable by mandamus.

REVIEW OF AUTHORITIES CITED BY APPELLANTS.

The case of *State* v. *Cochrell*, 27 Oklahoma, 630, 112 Pac. Rep., 1000, cited by appellants, is a case where the state examiner and inspector of the State of Oklahoma, sought by mandamus to compel the state bank commissioner to permit him to inspect the records kept by the state bank commissioner, concerning the Columbia Bank & Trust Company, a failed bank, whose assets had been taken charge of by the state bank commissioner.

The law prescribing the duties of the examiner, provides:

> "The examiner and inspector shall examine the books and records of state officers, whose duty it is to collect and distribute funds of the state, or under its management, at least once each year."

The sole question before the court was a construction of this statute and the power of the state examiner and inspector. Every expression in the opinion, outside of that issue was *arbiter dicta*. The court in its opinion said:

> "The control of the depositors' guaranty fund vests in the state just as much as the school land, or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance of the schools, *all of which are held in trust by the state for a specific purpose*. But even if it were not a special fund, it would at least be a fund 'under the management of the state.'"

The court does not decide that the depositors' guaranty fund belongs to the state of Oklahoma, for general purposes or that it is any part of the general state funds, or that it is usable by the state for general purposes at all. But holds in effect that the depositors' guaranty fund is held by the state for a specific purpose.

The statement of the court that the depositors' guaranty fund is held by the state for a specific purpose comports with the opinion of Mr. Justice Holmes, *supra*, in *Noble State Bank* v. *Haskell*, to the effect that the banks contributing to this fund have a reversionary interest in it, and likewise the depositors have the right to have the fund used for the purpose for which it was created. And the state has no interest in it whatever except to hold it as trustee for the purpose for which it was created.

In *Lankford* v. *Oklahoma Engraving & Printing Company*, 130 Pac., 278, cited by appellants, the court held that "the depositors of failed banks are entitled to be paid out of the depositors'

guaranty fund in preference to merchandise creditors of the failed bank." The court in its opinion said:

> "The depositors' guaranty fund was created for the payment of depositors only as defined in *Columbia Bank & Trust Co.* v. *United States Fidelity & Guaranty Co., supra.*"

The court also held that the state should have for the benefit of the depositors' guaranty fund, a first lien upon all the assets of failed banks, etc., for money advanced to pay depositors.

The case of *Columbia Bank & Trust Co.* v. *U. S. F. & G. Co.*, 126 Pac., 556, is a very instructive case as to the nature and character of the depositors' guaranty fund.

The court held, in effect, that special protection must be required by law of a depositor when depositing state funds in banks and where the depositors did not come under the protection of the depositors' guaranty fund; that the depositors' guaranty fund is for the protection of depositors of failed banks, and can be used for that purpose only.

The general principle forming the basis of all issues to be decided, is that the depositors' guaranty fund is a specific state fund, created for a specific purpose, namely, the payment of depositors of failed banks, and that such fund can be used for no other purpose whatever, and must be used for that purpose. Neither the State of Oklahoma, the state banking board, nor any other person whomsoever has any beneficial interest in, or power to, dispose of the depositors' guaranty fund, or power to use it for any other purpose.

ARGUMENT UNDER POINT SIX.

(a) The complainant alleged in the first count in the petition that, "On the 8th day of June, 1912, E. J. Merkle & Company,

of Kansas City, Missouri, deposited in said Farmers & Merchants Bank, the sum of $3900.00, and said Farmers & Merchants Bank on said date issued and delivered to said E. J. Merkle & Company a certificate of deposit, evidencing said deposit," etc.

"That said sum of $3900.00 evidenced by said certificate of deposit continued in and remained on deposit in said bank, from said date until the failure of said bank." (See pages 2 and 3 of the printed record.)

The same averments appear in the second count of complainant's petition. (See pages 6 and 7 of the printed record.)

The evidence at the trial proved and the court in its decree found these allegations to be true, namely, that the money was actually deposited in the bank, and that it remained in the bank on deposit until the bank failed.

The certificates of deposit issued by the bank, and received by the depositor were merely evidence of the deposit. It would have made no difference to the depositor whether that evidence was put in the form of a certificate of deposit, or was evidenced by an entry in a pass book, or by any other written evidence, acknowledging its receipt by the bank.

Had the officers of the bank issued spurious certificates of deposit and negotiated and sold such certificates of deposit to other parties, a question *might* have been raised as to whether the money was actually deposited in the bank; but no such issue is or can be presented here. There was no loan made to the bank. There was no selling or negotiating of spurious certificates of deposit. The money was actually deposited in the bank by the depositor, in the usual course of business, and it remained in the bank on deposit until the bank failed.

The evidence demonstrated this beyond cavil or question. The state banking board paid the city treasurer of the City of Sapulpa the deposit due him, based upon exactly the same pass book and the same evidence presented by the complainant. No reason or ex-

cuse has been or can be offered for denying complainant's right to have his deposit paid out of the depositors' guaranty fund, as was admitted by the state bank commissioner in his testimony at the trial.

(b) Tiffany on Banks and Banking says:

> "Ordinarily a depositor receives from the bank no evidence of his deposit, except the entry of the amount on his pass book. In such case the bank undertakes to honor his checks or other orders to the extent of his deposit. Sometimes, however, when a checking account as to a deposit is not contemplated, the bank issues a certificate of deposit. A deposit so made has the character of a general deposit, insofar as it creates simply the relation of debtor and creditor between the bank and the depositor."

In *Williams* v. *Rogers*, 77 Ky., 776, the purchaser of the assets of a bank assumed to pay all claims of "depositors" against the bank. In a proceeding to enforce payment of interest-bearing time deposits, the court holds:

> "Whenever a deposit is made in bank, the relation of debtor and creditor is established between the bank and the depositor, and that relation is the same whether it is an ordinary or time deposit. All deposits are loans."

In the opinion, pages 787-8, the court says:

> "It is further insisted that the terms of the contract between the Savings Institution and Hutchinson & Co. do not embrace the claims of appellee. That contract provides for the payment in terms of 'depositors.' Counsel present the question whether the expression is broad enough to include a 'loan,' such as the proof in this case establishes. We understand that all deposits are loans. Whenever a deposit is made in bank, the relations of debtor and creditor is established be-

tween the bank and the depositor. The identity of the particular money deposited is lost, and the relation between the parties continues the same whether it is an ordinary or a time deposit."

This is the precise question in the case at bar. All deposits are loans. Money actually deposited in bank is a "deposit" whether ordinary or time deposit. Whether a certificate of deposit can be impeached and proof made that, notwithstanding it, that the money was not in fact actually deposited in the bank, is not now before the court. For in this case the proof is conclusive *aliunde* the certificate of deposit, that the money was actually deposited in the bank. We contend that when it is proven beyond doubt the money was actually deposited in the bank in the usual course of business as a deposit, it becomes in law a "deposit."

The Constitution of South Carolina, Art. 9, Sec. 18, provides:

"The stockholders of an insolvent corporation will be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation, upon the stock owned by them. Provided, that the stockholders in banks or banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same."

The case of *Wilks & Co.* v. *Arthur*, 74 S. E., 361, is a suit by the *holder of a time certificate of deposit* to enforce liability against the stockholders of a bank. In that case the Supreme Court of South Carolina said:

"The framers of the Constitution did not contemplate fine-spun distinctions between those depositing money in the bank, subject to draft, and those receiving time certificates for their deposits; nor the characteristics of a certificate of deposit and those of a promissory note. It makes no difference how much similarity there may be between a time certificate of

deposit and a promissory note, it does not prevent the person receiving the certificate of deposit from still occupying the relation of a depositor. No authority has been cited, and we believe none can be found, sustaining the proposition that a party depositing money in a bank in the usual course of business and accepting a time certificate, is not to be regarded as a depositor."

In *Lamar* v. *Taylor*, 80 S. E., 1085, the charter of a state bank provides:

"And said stockholders shall be further and additionally individually liable equally and ratably, and not one for another, as sureties to depositors of said corporation for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock."

This was a proceeding to enforce liability against the stockholders of a failed bank, under this provision of the charter, in favor of the holders of certificates of deposit.

The Supreme Court of Georgia said:

"It was further contended that, in arriving at the amount for which suit was directed to be brought against each stockholder, in proportion to the number of shares of his stock, the presiding judge included the claims of holders of certificates of deposit, as well as those of ordinary deposits subject to check. The argument was that certificates of deposit were in the nature of promissory notes, and that holders of them were really creditors of the bank, rather than depositors, within the meaning of the charter. The language of the charter refers in general terms to depositors. It does not confine the liability of stockholders to the payment of depositors whose claims might be evidenced by entries in pass books, or exclude those whose claims might be evidenced by certificates. Certificates of deposit are not always uniform in their provision, and the special terms contained in them may to some extent vary their effect. The contention with which we are dealing does not depend upon the terms of any particular form of certificate, but on the theory that certificate holders generally are not depositors within the meaning of the charter. It is true that hold-

ers of certificates of deposit are creditors of a bank and that certificates of a certain form have been declared to be in effect promissory notes. *Lynch* v. *Goldsmith*, 64 Ga., 42. But a general deposit also creates the relation of debtor and credior between the bank and the depositor. It is not contemplated that the actual money deposited will be held by the bank, but that it will be used, and other money will be paid when called for by the check of the depositor. *Ricks* v. *Broyles*, 78 Ga., 610 (4), 3 S. E., 772, 6 Am. St. Rep., 280. Thus, whether a general deposit be evidenced by an entry in a pass book or by a deposit slip, or by a certificate, the legal relation between the parties is that of debtor and creditor. The expression "certificate of deposit' in itself imports that it is based upon a deposit and the issuance of such a certificate does not exclude the holder from falling within the general descriptive word 'depositor,' for whose benefit the additional liability was created by the charter."

These authorities hold clearly that when one deposits money in a bank, and accepts a certificate of deposit therefor, he is a *depositor*" within the meaning of the constitutional, statutory and charter provisions, protecting general depositors, and the legislature of Oklahoma in enacting the statute in question when it used the term "depositors," must be held to have intended by the use of that term to adopt the construction given by the supreme courts of other states, who had theretofore construed similar laws.

All of which is respectfully submitted,

CHAS. A. LOOMIS,
Solicitor for Appellee.

INDEX OF SUBJECTS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

J. D. LANKFORD, JOHN J. GERLACH, W. F. BARBER and A. D. KENNEDY, Composing the State Banking Board of the State of Oklahoma,

Appellants,

v.

PLATTE IRON WORKS COMPANY, a Corporation,

Appellee.

No. 381

APPEAL FROM UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF OKLAHOMA

Supplemental Brief on Behalf of Appellee.

CHAS. A. LOOMIS,
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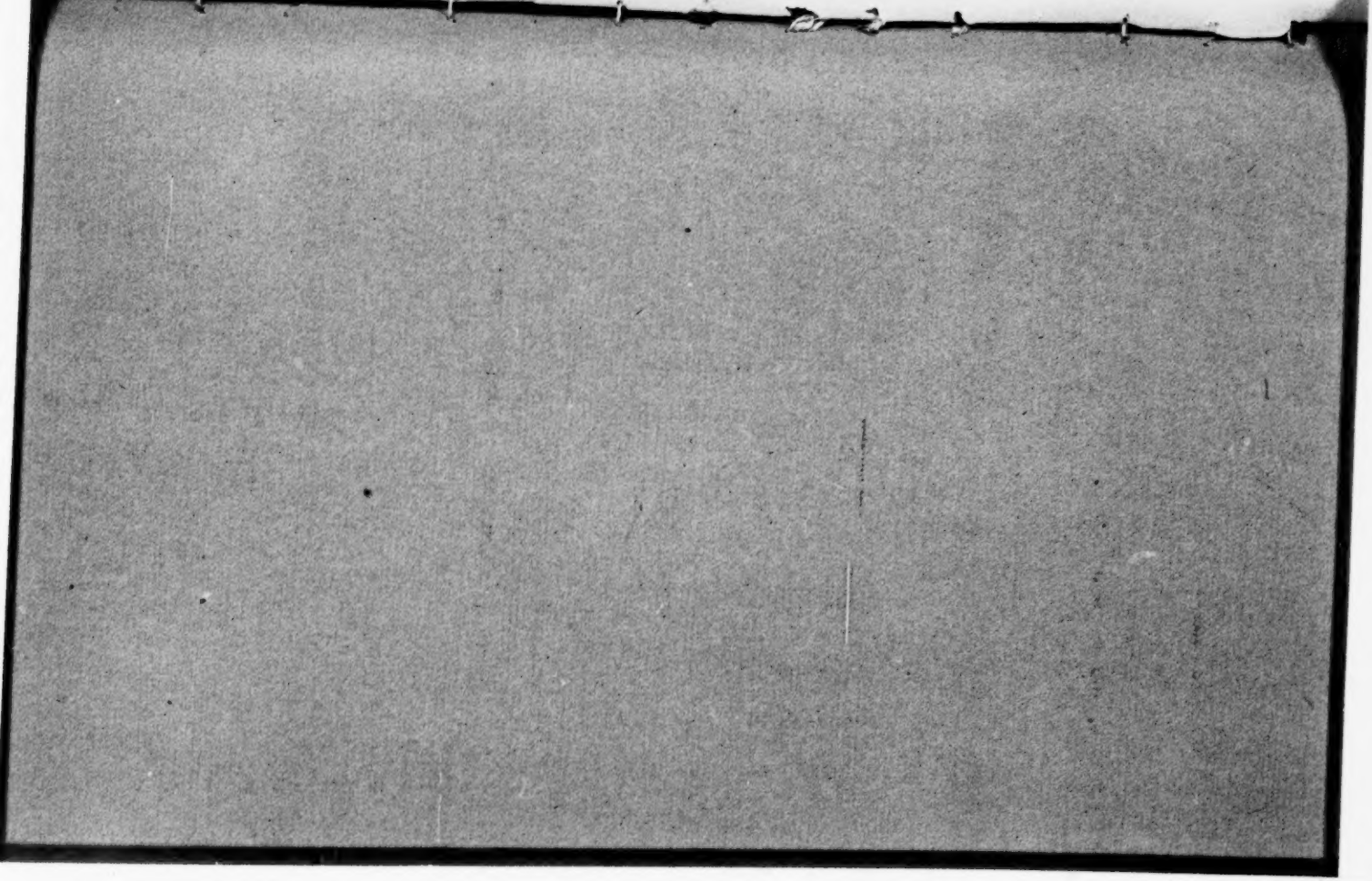

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Point One.

The Federal Courts have an independent jurisdiction in the administration of the state laws in cases between citizens of different states, co-ordinate with and not subordinate to that of the state courts and are bound to exercise their own judgment as to the meaning and effect of those laws.

Burgess v. *Seligman*, 107 U. S., 20 and 30; 27 L. Ed., 359, l. c. 365;

Bucher v. *Cheshire R. Co.*, 125 U. S., 555; 31 L. Ed., 795;

Julian v. *Central Trust Co.*, 193 U. S., 93; 48 L. Ed., 629;

Stanley Co. Comm'rs v. *Coler*, 190 U. S., 437; 47 L. Ed., 1126;

Kuhn v. *Fairmount Coal Co.*, 215 U. S., 349-360; 54 L. Ed., 228, 334-5 and cases cited;

Oats v. *First National Bank*, 100 U. S., 239; 25 L. Ed., 580;

Pana v. *Bowler*, 107 U. S., 529; 27 L. Ed., 424.

Point Two.

Since the decision in *Swift* v. *Tyson*, 16 Pet., 1-19; 10 L. Ed., 865, 871 it has been the accepted doctrine of this court that in respect to the doctrine of commerical law and general jurisprudence the courts of the United States will exercise their own independent judgment. And in respect to such judgment will not be controlled by decisions based upon local statutes or local usage, although if the question is balanced with doubt, the United States Court, for the sake of harmony, "will lean to an agreement of views with the state courts."

Swift v. *Tyson*, 16 Pet., 1-19; 10 L. Ed., 865, 871;

Presidio Co. v. *Noel-Young Bond & S. Co.*, 212 U. S., 58; 53 L. Ed., 402 and cases cited;

Burgess v. *Seligman*, 107 U. S., 20-30; 27 L. Ed., 359, l. c. 365.

Point Three.

When the law of a state has not been settled it is not only the right but the duty of the Federal Court to exercise its own judgment in construing state statutes, as it also always does when the case before it depends on the doctrine of commerical law and general jurisprudence.

Kuhn v. *Fairmount Coal Co.*, 215 U. S., 349, 360; 54 L. Ed., 228, 234-5;
Swift v. *Tyson*, 16 Pet., 1-19; 10 L. Ed., 865, 871.

Point Four.

As the very object in giving the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states, was to institute an independent tribunal which would not be supposed to be affected by local prejudice or sectional views it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

Burgess v. *Seligman*, 107 U. S., 20-30; 27 L. Ed., 359, l. c. 365;
Julian v. *Central Trust Co.*, 193 U. S., 93; 48 L. Ed., 629;
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Respectfully submitted,

CHAS. A. LOOMIS,
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